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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 71-651

STATE OF CALIFORNIA,

Petitioner,

v.

JUDITH H. KRIVDA and RODGER T. MINOR.

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF

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OPINION BELOW

The opinion of the California Supreme Court is reported as *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). A copy of this opinion is set forth as Appendix A to the Petition for Writ of Certiorari.

The prior opinion of the California Court of Appeal, Second Appellate District, Division One is reported as *People v. Krivda*, 91 Cal. Rptr. 219 (1970). The Court of Appeal opinion was superseded when the California Supreme Court granted a hearing pursuant to Rule 28 of the California Rules of Court. Consequently the Court of Appeal opinion appears only in the unofficial reports. A copy of the Court of Appeal opinion is set forth as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the California Supreme Court was filed on July 12, 1971, that court entering a further order on August 16, 1971, denying petitioner's petition for rehearing and application for stay of the remittitur. (Petn. for Cert., Apps. A & B) The Petition for Writ of Certiorari was filed November 12, 1971, and was granted April 3, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to the street for the purpose of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pickup and prior to the comingling of the contraband with the trash of other persons?

2. Whether in any event, application of the exclusionary rule is constitutionally compelled under the circumstances of the present case?

CONSTITUTIONAL PROVISIONS INVOLVED

A. FEDERAL CONSTITUTION

United States Constitution, Article I, Section 9.

> "No Bill of Attainder or ex post facto law shall be passed."

United States Constitution, Amendment IV.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment IX:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

United States Constitution, Amendment X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

United States Constitution, Amendment XIV, Section 1 in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B. CALIFORNIA CONSTITUTION

California Constitution, Article I, Section 19:

> "The right of the people to be secure in their persons, houses, *papers and effects,* against unreasonable seizures and searches shall not be violated and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

C. LOS ANGELES COUNTY ORDINANCES

ORD. NO. 5860 71-8608 Eff. 6-26-64

Chapter IX
Waste Collection and Transportation

Article 1. Definitions

Section 1601. Person.

"Person" means any individual, firm, co-partnership, corporation, municipality, district, or other political subdivision, or any other group or combination acting as a unit.

Section 1602. Public Agency.

"Public Agency" means and includes the Federal Government or any department or agency thereof, the State or any department or agency thereof, a county, city and county, city, public corporation, municipal corporation, or public district.

Section 1603. Truck.

"Truck" means any truck, trailer, semi-trailer, conveyance, or vehicle used to collect, haul or transport

garbage, rubbish, or industrial waste upon or along the public highways.

Article 2. License Required

Section 1611 (8608 6-26-64) Waste Collector License Required.

Every person operating one or more trucks in the business of collecting, transporting, conveying, hauling, and disposing of any rubbish, garbage, or industrial waste from the property where such materials originate to another location, for transfer, salvage, or disposal shall first procure a license and pay an annual license fee for each truck of:

(a) Forty-one dollars for the first year.

(b) Twenty-Seven Dollars for each annual renewal.

Section 1612 (8608 6-26-64) Waste Hauler License Required.

Every person operating one or more trucks upon or along any public highway in the unincorporated area of the County who is transporting, conveying, hauling, or disposing of rubbish, garbage, or industrial waste but who is not required by Section 1611 to obtain a Waste Collector's License, and who is not otherwise exempted from the provisions of this Chapter, shall first procure a Waste Hauler's License and pay an annual license fee of twenty-one dollars for each such truck not so licensed.

Section 1613. Householders' Exclusion.

Householders hauling occasional loads of manure or rubbish not containing garbage from their own premises to a legal point of disposal shall be excepted from the provisions of this article.

Section 1618. Bond.

The Tax Collector shall not issue a Waste Collector's license or a Waste Hauler's license until the applicant files with the Tax Collector a cash bond or a corporate surety bond in the sum of two thousand five hundred dollars conditioned that:

(a) ...

(b) ...

(c) The applicant shall comply with all the terms and conditions of any permit, license, or exception granted, and with all laws, statutes, ordinances and regulations, relating to the collection or transportation of garbage, rubbish, or industrial waste.

Article 4. Waste Collectors

Section 1687. Hours of Collection.

The collector shall not collect garbage or combustible or noncombustible rubbish within a residential area between the night time hours of 10:00 P.M. and 6 o'clock A.M. the next day, provided, however, that the Health Officer may waive such requirement when necessitated by conditions beyond the control of the collector.

Section 1688. Vehicles.

All trucks, trailers, and other conveyances or equipment used to collect garbage or rubbish shall at all times be kept clean, in good repair, and well painted, to the satisfaction of the Health Officer.

The Collector's name or firm name, together with his phone number, shall be printed or painted in legible letters, not less than three (3) inches in height, on both

sides of all trucks and conveyances used to collect garbage and rubbish.

Section 1689. Care of Containers.

All containers shall be replaced where found. Containers and lids shall not be deposited in the street or on adjoining property.

The collector, his agents and employees, shall not throw garbage or rubbish containers from the truck to the pavement, or in any other way break or damage or roughly handle the same.

Section 1706. Containers to be placed at Curb or Alley.

The collector may agree with the occupant of a dwelling or other building to collect garbage and rubbish from the rear yard or other portion of the property. The Health Officer may direct or permit the collection of garbage or rubbish from a particular location on or near the property. The collector shall collect all garbage and rubbish as so agreed to, directed or permitted. Otherwise, the collector shall collect all garbage and rubbish from the curb along the street in front of each dwelling or human habitation, if no paved alley exists in the rear of such properties, or such alley is:

(a) A blind alley;

(b) An alley less than fifteen (15) feet wide;

(c) An alley that is "L" or "T" shaped and not wide enough to be safe for collection trucks to turn without damage to them or to adjacent improvements on private property;

(d) An alley the surface of which is of such material as to endanger the safety or the convenient operation of the trucks at all seasons of the year.

Otherwise, the collector shall collect all garbage or rubbish from the paved alley, in which case, the garbage and rubbish to be collected shall be placed on the premises within two feet of the rear property line, if physically possible and if freely accessible from the alley; if not, then off the premises within two feet of the rear property line.

Section 1707. Containers – At Place of Collection.

A person shall not place any rubbish, or any container containing garbage or rubbish, or both, at the place of collection before six o'clock P.M. of the day preceding the scheduled collection of the said garbage or rubbish, or both, or leave any such container at the place of collection after eight o'clock P.M. on the day of actual collection, or more than two hours after actual collection, whichever is later.

Section 1708. (8707 11-6-64) *Containers – Commercial and Industrial.*

Every waste collector who owns, rents or controls any container, bin or other equipment used for the storage of garbage, industrial waste, market refuse or rubbish shall:

(a) Place and maintain on the outside of such container, bin or other equipment, in legible letters and numerals not less than one inch in height such waste collector's name or firm name, and telephone number.

(b) At all times keep in good repair and maintain in a clean and sanitary condition such container, bin, or other equipment to the satisfaction of the Health Officer.

Section 1709. (8707 11-6-64) *Prohibition.*

A person other than the waste collector having charge thereof, shall not deface, alter, remove or obliterate any

identification placed on any container, bin or other equipment pursuant to the provisions of this article.

Section 1710. (8707 11-6-64) *Tampering.*

A person not having the authority to do so, shall not tamper with, injure, destroy, or remove any container, bin, or other equipment used for the storage of garbage, industrial waste, market refuse, or rubbish.

D. LOS ANGELES MUNICIPAL CODE

Chapter VI, Article 6

Section 66.00. (Amended by Ord. No. 118,900, Eff. 6/3/61) –

Definitions.

For the purpose of this article, the following words and phrases are defined and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning:

1. REFUSE shall mean any combination of rubbish and garbage.

(a) HOUSEHOLD REFUSE shall mean any combination of rubbish and garbage generated at a private residence or that part of any place used as a private residence except a hotel, motel or tourist camp as those places are defined in this Article.

(b) COMMERCIAL REFUSE shall mean either rubbish or any combination of rubbish and garbage generated at such hotel, motel, tourist camp or place or part thereof used other than as a private residence.

2. GARBAGE shall mean either animal or vegetable residue or any combination thereof resulting from any

use of a food, beverage or mixture of food and beverage except food plant waste, market waste or dead animals.

(a) HOUSEHOLD GARBAGE shall mean all garbage other than commercial garbage.

(b) COMMERCIAL GARBAGE shall mean garbage resulting from the preparation or other processing of a food, beverage or mixture thereof for consumption on the premises of any place other than a private residence.

(c) FOOD PLANT WASTE shall mean either animal or vegetable matter or any combination thereof resulting from the manufacture, production or other creation of a food, beverage or mixture thereof for any commercial use, elsewhere than at the place where manufactured, produced or otherwise created.

(d) MARKET WASTE shall mean either animal or vegetable matter or any combination thereof which accumulates for disposal at any place other than the place of ultimate consumption by reason of any change in its form or condition during the process of marketing such matter.

3. RUBBISH shall mean any combination of combustible, non-combustible or building material rubbish.

(a) COMBUSTIBLE RUBBISH shall mean paper and paper products; cloth and clothing, carpets, linoleum and similar floor coverings; feathers; grass and tree and shrubbery trimmings; leather and leather products; rubber and rubber products; plastics; straw and other combustible packing; wood and wood products; and similar articles that will

incinerate through contact with flames of ordinary temperature.

(b) NON-COMBUSTIBLE RUBBISH shall mean ashes, bottles, broken crockery, glass, metals, construction material other than building material rubbish, and other similar household substances that will not incinerate through contact with flames or ordinary temperature.

(i) ASHES shall mean that non-combustible rubbish which is the solid residue from the thorough burning of combustible substances.

(ii) METALS shall mean that non-combustible rubbish which is principally made of metal such as tin cans, toys and other similar items designated as such by the Board.

(c) BUILDING MATERIAL RUBBISH shall mean either any unusual quantity, as further defined by the Board by rule or regulation, of noncombustible rubbish such as rock, gravel, brick, plaster, plasterboard, tile, mortar or concrete or any unusual quantity of combustible rubbish, similarly defined, such as materials resulting from building construction, alteration, repair or improvement or any combination of such noncombustible and such combustible rubbish.

4. SALVAGE shall mean any item of refuse designated by the Board and approved by the Council as having sufficient value to warrant the sale thereof.

5. CONTAINER shall mean any receptacle used or intended to be used for storing either rubbish, garbage or refuse for collection.

6. HOTEL shall mean a residential building designed or used for or containing six or more guest rooms or suites of rooms, but not including any institution in which human beings are housed or detained under legal restraint.

7. MOTEL shall mean a group of attached or detached buildings containing individual sleeping or living units, designed for or used temporarily by automobile tourists or transients, with garage attached or parking space conveniently located to each unit, commonly referred to as auto courts, motels, motor lodges, tourist courts and similar designations.

8. TOURIST CAMP shall mean any place, area or tract of land upon which are located two or more cabins, trailer coaches, automobile house trailers, automobiles used for sleeping purposes, or other camping outfits commonly referred to as tourist camp, trailer park, and similar designations.

Section 66.00.1. (Amended by Ord. No. 118,900, Eff. 6/3/61) – *Refuse Service - Refuse Collection.*

(a) (Amended by Ord. No. 127,743, Eff. 7/24/64.) It is the policy of the City of Los Angeles to provide, subject to the availability of funds therefor, for the collection by municipal forces of household refuse, commercial garbage and dead animals, but not to provide for such collection of commercial refuse, food plant waste, market waste or building material rubbish. It is further the policy of the City of Los Angeles:

1. To collect household refuse, including metals, combined in one or more containers, by a single pick-up on a regularly scheduled basis;

2. To collect commercial garbage on a regularly scheduled basis as a public health measure, provided, however, that any producer of such garbage may contract directly with others for the collection of such garbage subject to the issuance of the necessary permit by the Board in accordance with this Code;

3. To collect dead animals on call as the need occurs, including such removal from commercial establishments only when death of such animal or fowl is from natural causes, or accidental, or through intentional destruction for humane reasons to prevent suffering on the part of the animal or fowl from sickness or injury; and provided that the animal or fowl is not killed as the result of the regular or routine operation of any commercial enterprise, thereby intentionally creating the carcasses.

(b) (Amended by Ord. No. 127,743, Eff. 7/24/64.) It is the policy of the City of Los Angeles to dispose of refuse collected by the City, including metals, in land reclamation sites owned and operated or otherwise controlled by the City or in City-owned incinerators when economically feasible, or by contractual arrangement where appropriate. Contractual arrangements involving consideration in excess of $5,000.00 shall be approved by the Council by ordinance or resolution, except in the case of an emergency as determined by the Director of the Bureau of Sanitation.

(c) Incinerators and land reclamation sites operated by the City shall be available for public use subject to the following conditions:

1. That the Board, after fully considering all the facts, determines that there exists at a particular incinerator or land reclamation site a capacity for refuse disposal in excess of that needed by the City;

2. That the Board, after considering the size and capacity of a land reclamation site, the location in which it is situated, the nature and condition of the roads giving access thereto, and other and similar considerations, determines, subject to the approval by the Council, that the use for public dumping purposes of a particular land reclamation site is in the public interest;

3. That the Board, subject to approval by the Council, shall fix chartes for the public use of incinerators and land reclamation sites operated by the City in such amounts as are sufficient to ensure that each use will bear a proportionate share of the maintenance amortization, operation, handling and other costs. The Council may by resolution, either upon its own motion or upon recommendation of the Board, increase or decrease charges in order to meet changing cost conditions.

(d) Land reclamation sites owned by the City shall be devoted upon completion of reclamation to such use as the Council shall determine.

(e) The Board of Public Works shall adopte rules and regulations, not inconsistent with this Article, to effectuate the purposes and intent of this Section and the further provisions of this Article. Any such rule or regulation pertaining to refuse collection shall be approved by the Council.

(f) (Added by Ord. No. 125,989, Eff. 12/16/63.) The Board of Public Works, subject to the approval of the Council in each instance by resolution, may from time to time institute and conduct one or more programs within an area or areas of the City designated by the Board whereby household refuse including metals and other salvage is combined in one or moré containers for a single pickup on a regularly scheduled basis for the purpose of studying the costs to the City of such program or programs compared with the costs to the City under the collection policies set forth in Subsection (a) of this Section.

Section 66.01. *Garbage Collection.*

No person shall remove or convey any garbage upon or along any street in this City; provided, however, that the provisions of this section shall not apply to any person in the employ of this City who shall be assigned by the Board to the work of garbage disposal or to any person with whom this City has entered into, or may hereafter enter into, a contract for the collection, removal and disposal of garbage or to any employee of such contractor during the time his contract shall be in force, and provided further that refuse collection and disposal contractors serving neighboring municipalities, County garbage district, State or Federal institutions, or any person in the employ of any such governmental agency may haul garbage over the streets of this City after having first obtained apermit therefor from the Board of Public Works.

Section 66.01.1 *Food-Plant Waste - Transportation - Permit Required.*

No person shall remove or convey any food-plant waste upon or along any street in this City without a permit therefor from the Board of Public Works; each applicant for a permit hereunder shall agree to comply with such rules and regulations as the Board may establish for the hauling of such waste.

Section 66.02. *Garbage Containers.*

(a) GARBAGE RECEPTACLES - SPECIFICATIONS. It shall be the duty of every owner, manager, or person in possession, charge or control of any boarding house, restaurant, hotel, apartment or eating house, and every person occupying a dwelling or flat within this City to provide, and at all times to keep, portable vessels, tanks or receptacles for holding garbage. Each vessel, tank or receptacle shall be constructed water tight and so constructed as to contain not less than three or more than sixteen gallons and provided with handles and a tight fitting cover. Each such vessel, tank or receptacle and cover shall be made of such materials as may be approved for such use by the Board and by the City Council. The cover shall not be removed except when necessary to place garbage therein or to remove garbage therefrom. Each vessel, tank or receptacle and its cover shall be kept cleaned on the outside from accumulating grease and decomposing material.

(b) GARBAGE RECEPTACLES - CLEANING. Each vessel, tank, or receptacle used by an employee of the City, assigned to the work of garbage disposal or by a duly authorized contractor in the removal of garbage from premises to the transporting receptacle, shall have the grease and other adherent material removed at least

once daily and be further cleaned by immersion through an approved disinfecting solution or by the application of live steam.

(c) GARBAGE RECEPTACLES - LOCATION OF. Each can, vessel, tank or receptacle provided by the owner, manager, or person in possession, charge or control of any boarding house, restaurant, hotel, apartment or eating house or a person occupying a dwelling or flat, shall be placed for collection on the curb in front of the premises for which it is provided except where the premises abut upon an alley conforming to the following conditions;

1. The alley be a through alley so that refuse trucks need not back out of it;

2. The alley be not less than 15 feet wide;

3. If the alley be L or T-shaped, the turns be wide enough to be safe for the refuse collection trucks to turn without damage to them or to adjacent improvements on private property;

4. The surface of the alley be of such material as to insure reasonable safety for the convenient operation of refuse trucks at all seasons of the year; in which case the can, vessel, tank or receptacle shall be placed on the premises within 2 feet of the rear property line thereof, if physically possible and if freely accessible from the alley; if not, then off the premises within 2 feet of the rear property line.

(d) GARBAGE RECEPTACLES - TIME FOR SETTING OUT AND REMOVAL OF. No owner, manager or person in possession, charge or control of any boarding house, restaurant, hotel, apartment house or eating house, located in a district where garbage is scheduled to be collected between the house of 6 A.M. and 6 P.M., or

person occupying a dwelling or flat located in such district, shall place any can, vessel, tank or receptacle containing garbage at the place of collection before 6 P.M. of the day preceding the scheduled collection of said garbage, nor leave any such can, vessel, tank or receptacle at the place of collection after 8 P.M. of the day of actual collection.

No owner, manager or person in possession, charge or control of any boarding house, restaurant, hotel, apartment house or eating house, located in a district where garbage is scheduled to be collected between the hours of 6 P.M. and 6 A.M., or person occupying a dwelling or flat located in such district, shall place any can, vessel, tank or receptacle containing garbage at the place of collection before 5 P.M. of the scheduled night of collection of said garbage, nor leave any such can, vessel, tank or receptacle at the place of collection after 8 A.M. of the day following the night of actual collection.

(e) (Amended by Ord. No. 128,102, Eff. 9/18/64) GARBAGE RECEPTACLES - COMBINED REFUSE COLLECTION. Notwithstanding other provisions of this Code to the contrary, when garbage is collected combined with other refuse, it shall be thoroughly drained and securely wrapped. Such drained and wrapped garbage shall be stored in metal, water-tight containers, or their equivalent, equipped with tight-fitting covers, and otherwise in compliance with applicable provisions of Ordinance No. 127,507.

Section 66.03 *Garbage Containers - Tampering with.*

No person, other than the owner thereof, his agents or employees, or an officer or employee of this city, or any person holding a contract with this city for the collection of garbage, or his agents or employees authorized for

such purposes, shall tamper or meddle with any vessel, tank or receptacle for holding garbage or the contents thereof, or remove the contents of any such vessel, tank or receptacle, or remove any such vessel, tank or receptacle from the location where the same shall have been placed by the owner thereof or his agent, regardless of whether or not the vessel, tank or receptacle conforms to the requirements or descriptions set forth in Section 66.02.

No person shall place any substance other than garbage in any such vessel, tank or receptacle.

Section 66.13. *Combustible Rubbish and Market Refuse–Place of Disposal*

(a) Any combustible rubbish or market refuse conveyed upon or along any street for disposal shall be disposed of at a lawful place; and if such is to be disposed of within the City, it shall be either at a municipal incinerator operated by the City or at a duly authorized public dump operated under permit from the Board or a land reclamation site operated by the City. Either combustible rubbish or market refuse having a salvage value may be segregated from other such material prior to conveyance to a municipal incinerator or land reclamation site and the salvaged material disposed of at any lawful place. (Amended by Ord. No. 108,011, Eff. 10/1/56).

(b) No person having control or possession of any business establishment, building, property or premises as owner or otherwise, shall remove or have removed, or convey or have conveyed any combustible rubbish or market refuse originating therein or thereon to any place for its disposal other than as provided in the preceding subsection.

(c) No person shall deposit any combustible rubbish or market refuse within this City upon or in any street, or in the Los Angeles River or any other stream or watercourse or in the beds thereof, or upon any public or private premises except at a municipal incinerator, land reclamation site or public dump designated by this section. (Amended by Ord. No. 108,011, Eff. 10/1/56.)

(d) No person in charge of any municipal incinerator or land reclamation site operated by the City, or any other person connected directly or indirectly therewith, shall charge for the disposal of rubbish or market refuse any rates other than those established in accordance with Sec. 66.00.1(d). (Added by Ord. No. 108,011, Eff. 10/1/56).

Section 66.14. *Incinerator Conditions. (Title Amended by Ord. No. 108,011, Eff. 10/1/56.)*

(a) (Repealed by Ord. No. 108,011, Eff. 10/1/56.)

(b) (Repealed by Ord. No. 108,011, Eff. 10/1/56.)

(c) Materials brought to any municipal incinerator for disposal shall not exceed the following dimensions for individual pieces:

1. Solid material, four feet in length by one and one-half feet in any other dimension.

2. Material capable of being compressed or crushed, such as barrels, packing cases and the like, six feet in length by five feet in any other dimension.

(d) All material brought to any municipal incinerator for disposal shall be ready for immediate dumping, and no person shall salvage or attempt to salvage any material at any municipal incinerator.

(e) Vehicles bringing material to any municipal incinerator conforming to the following provisions of this subsection will be given preference in the prompt assignment of unloading positions at the incinerator:

1. Vehicles of the type designed to dump from the rear by the mechanical elevation of the front of the body; or

2. Vehicles equipped with an inner removable body or a removable lining of canvas, woven rope or wire or other flexible material securely fastened to the truck body at the rear and free at the front of the truck body, so that the load can be dumped by elevation of the free end of the lining by mechanical apparatus such as hooks, cable and winches provided at any municipal incinerator.

(f) Material not conforming, or brought to any municipal incinerator by vehicles not conforming, or sought to be discharged thereat by equipment not conforming to the provisions of this section, need not be accepted.

Section 66.15 *(Amended by Ord. No. 140,388, Eff. 6/28/70.) Combustible Rubbish - Public Dump.*

It shall be unlawful to burn combustible rubbish on private property or upon public dumps within the City of Los Angeles.

EXCEPTION:

The regulations in this section shall not apply to combustible tree, shrub and grass cuttings and other household rubbish normally accumulated on the premises by the owner or occupant and disposed of in accordance

with Municipal Code requirements governing the use of household incinerators and open burning.

The Board is authorized to issue revocable permits for the operation of "Fill and Cover" dumps upon the payment of an annual fee of $1,650.00 if the Board finds that such dumps are in the public interest.

Permits for the operation of "Fill and Cover" dumps may be issued by the Board subsequent to its investigation of each particular site. The Board shall require satisfactory and nuisance-free operation of each such dump.

Each application for the operation of such "Fill and Cover" dumps shall be referred to the Board of Water and Power Commissioners for recommendation. Any conditions recommended by said Board shall be included in any permit granted by the Board of Public Works. Should said Board of Water and Power Commissioners recommend denial of such application for permit, good cause being shown, the same shall be denied by said Board of Public Works.

The Board is hereby authorized and empowered to adopt such rules and regulations and impose such other conditions as the Board deems necessary to carry out the purpose of this section.

Section 66.16. *Permits Not Transferable.*

No permit granted pursuant to the provisions of Sections 66.08 to 66.15, inclusive, shall be assigned or transferred, nor shall such permit be issued to extend to a later date than the first of January next succeeding the date of its issuance.

Section 66.18. *Non-Combustible Rubbish - Permit.*

No person shall remove or convey any non-combustible rubbish upon or along any public street without first filing a written application and obtaining a written permit from the Board so to do.

The provisions of this section shall not apply to any person in the employ of the Board or with whom the City has entered into or may hereafter enter into a contract for the removal, disposal and conveyance of non-combustible rubbish, or to any employee of such contractor during the time that the contract is in force.

Section 66.21. *Permits Not Transferable.*

No permit issued pursuant to Section 66.18 shall be assigned or transferred.

Section 66.28. *(Amended by Ord. No. 124,024, Eff. 3/14/63.) Containers - Tampering with.*

No person, other than the owner thereof, his agents or employees, or an officer or employee of this City or any person holding a contract with this City for the collection or disposal of refuse, his agents or employees authorized for such purposes, shall tamper or meddle with any refuse or rubbish container or the contents thereof, or remove the contents of any such container or remove any such container, from the location where the same shall have been placed by the owner thereof or his agent, regardless of whether or not such container conforms to the requirements or description set forth in the rules and regulations of the Board.

Section 66.29. *Employees - Use of Rubbish.*

No employee of this City shall remove or dispose of, for said employee's individual use or benefit, any of the contents of any vessel, tank or receptacle used for the

collection, removal or disposal of rubbish. (Amended by Ord. No. 108,011, Eff. 10/1/56.)

STATEMENT OF THE CASE

A. HISTORY OF THE CASE

On September 18, 1968, the District Attorney of Los Angeles County filed an information in the Superior Court of the State of California for the County of Los Angeles charging respondents Judith H. Krivda and Rodger T. Minor with possession of marijuana in violation of section 11530 of the California Health and Safety Code. (App. p. 2.) Respondents' motion to set aside the information pursuant to California Penal Code section 995 was denied. (App. p. 3.) Respondents thereafter entered pleas of not guilty (App. p. 4.)

Respondents' motion to suppress evidence pursuant to California Penal Code section 1538.5 was submitted on the transcript of the preliminary hearing[1] and on further testimony adduced at a hearing on that motion.[2] (App. pp. 5-6) The motion to suppress evidence was denied at the conclusion of the hearing held on October 24, 1969. (App. p. 6.) On December 12, 1969, the trial court, with the same judge presiding, permitted the respondents to reopen their motion to suppress evidence. On the basis of the same evidence and arguments previously presented, the trial court reversed its ruling and granted the motion to suppress evidence. On petitioners' representation that

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[1]The Reporter's Transcript of the preliminary examination is set forth verbatim at pages 10-76 of the Appendix.

[2]The transcript of the additional testimony presented at the hearing on the motion to suppress evidence is set forth at pages 77-83 of the Appendix.

no other additional evidence existed, and on the court's own motion, the action was dismissed in the interests of justice. (App. p. 7.)

Petitioner appealed to the California Court of Appeal, pursuant to California Penal Code section 1238, subdivision 7,[3] from the order of the superior court suppressing evidence and dismissing this cause. (App. p. 8.) On November 16, 1970, Division One of the California Court of Appeals for the Second Appellate District reversed the judgment and order of the superior court in an opinion set forth in Appendix C to the Petition for Writ of Certiorari.

The California Supreme Court granted respondents' petition for hearing and, in a 4-3 decision rendered on July 12, 1971, affirmed the superior court's judgment of dismissal and order suppressing the evidence. *People v. Krivda*, 5 Cal.3d 357, 96 Cal. Rptr. 62, 486 P.2d 1262 (1971). (*See* App. A, Petn. for Cert.) On August 16, 1971, the California Supreme Court denied petitioner's petition for rehearing and application for stay of the remittitur. (*See* App. B. Petn. for Cert.)

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[3]Penal Code section 1238 provides:

"An appeal may be taken by the people from any of the following:

". . . .

"7. An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code. . . ."

B. STATEMENT OF FACTS

On July 1, 1968, Officer Stephen C. Gates of the Los Angeles Police Department received a telephone call from an anonymous female informant who told him that "Rodger" and "Judy" were engaging in narcotic activities, *i.e.*, smoking marijuana and injecting methedrine. (App. pp. 12-13.) The informant indicated that there were many sex parties at their 1901 Nolden residence in Los Angeles and that a Lesbian named "Frankie" was living there. The informant also indicated that both Rodger and Judy were injecting the two children who resided at that location with methedrine. The informant said that she had heard this from Judy, who said she enjoyed the effects of methedrine and that she also wanted her children to experience the feeling of being under the influence of methedrine. (App. pp. 12-13.)

After receiving this information, Officer Gates and his partner, Officer William Marsden, located the address and observed two young female children in front of the premises. Officer Gates then ran a utility check which indicated that Judy Krivda was paying for the utilities at 1901 Nolden. (App. pp. 13, 48.) Officer Gates also checked criminal records with the Los Angeles Police Department and determined that three individuals with the last name of Krivda had been arrested in Los Angeles. Upon further investigation Officer Gates discovered that one of these individuals, Edward Joseph Krivda, had a wife named Judy. (App. p. 13.) The records also indicated that Edward Joseph Krivda had been arrested for possession of dangerous drugs for sale and also sale of dangerous drugs. (App. p. 14.)

At about 11 a.m. on July 9, 1968, Officer Gates and his partner returned to the vicinity of 1901 Nolden. The

residence at that address was a single family dwelling. (App. p. 14.) From their vantage point, the officers observed several trash barrels directly in front of the house at 1901 Nolden. (App. pp. 14-15, 17.) The trash barrels were in the parkway adjacent to the sidewalk, thirty to forty yards from the house. (App. pp. 17, 28.) The home adjacent to 1901 Nolden was approximately twenty feet down the hill. (App. p. 15.)

The officers observed refuse collectors approximately a block away from the house at 1901 Nolden. (App. p. 14.) Officer Gates stopped the collectors approximately half a block west of the premises. (App. pp. 14, 18.) After identifying himself as a police officer, Officer Gates told the trash collectors that he was interested in looking at the contents of the trash barrels in front of 1901 Nolden. (App. pp. 14-18.) He asked them to empty the well of their truck, to pick up the trash in front of the house at 1901 Nolden, and then to meet Officer Gates and his partner approximately one block north of the location. (App. pp. 14, 18, 70.)

Officer Gates observed the refuse collectors drive their truck to the front of the premises at 1901 Nolden. He observed them go to the back of the truck, take the trash barrels, place the contents of the trash barrels in the well, and then drive north to where he and Officer Marsden were waiting. Officer Gates had examined the well of the trash truck prior to the emptying of these specific garbage cans into the well. There had been no refuse at all in the well prior to the emptying of the garbage cans at 1901 Nolden. Officer Gates did not observe the collectors empty any other garbage cans into the well of the truck between the time they placed the trash from those cans into the well and the time the truck arrived at his location. (App. pp. 18-19.)

When Officer Gates examined the contents of the well of the trash truck, he observed approximately five brown paper sacks among the refuse. Upon examining the sacks, he found that they contained what appeared to be marijuana debris and marijuana seeds. (App. p. 19.) In one of the bags, Officer Gates found approximately four to six partially burned marijuana cigarettes. (App. pp. 20, 57.) Also among the contents in the well of the trash truck, Officer Gates found an envelope with the name Edward Krivda and the address 1901 Nolden, a hand-written letter with the name Frankie mentioned in it, and a three by five card with the names Rodger and Judy written on it. (App. pp. 20-21.)

After Officer Gates had examined the contents of the well of the trash truck, he went back to his former vantage point. There he observed respondent Rodger Minor come from the premises at 1901 Nolden and pick up the trash barrel which had contained the marijuana debris. Respondent Minor, wearing only a towel around his waist, took the trash barrels to the front porch of the house. (App. pp. 21-22, 81.)

At this point Officer Gates and his partner requested the assistance of a uniformed sergeant. The uniformed officer and Officer Gates approached the front of the premises while Officer Marsden positioned himself at the rear. When respondent Minor met Officer Gates at the front door, Officer Gates placed him under arrest for possession of marijuana. (App. pp. 22, 40, 43.) The officers then effected entry, discovered respondent Krivda in the residence, and recovered additional marijuana and paraphernalia. (App. pp. 23-25, 46.)

SUMMARY OF ARGUMENT AND CONTENTIONS OF RESPONDENTS; RESPONSE TO CONTENTIONS OF PETITIONERS

The statement of facts set forth by petitioner in its Petition for Certiorari (Pages 6-7) and in its Opening Brief (Pages 5-8), appears to adequately portray the background of the case, with the emphasized fact that an untested, unreliable, anonymous informant placed a telephone call to Los Angeles Police concerning respondents (App. 12). This phone call was the precursive impetus to a surveillance of respondents home at 1901 Nolden, Los Angeles, California. That surveillance gleaned nothing save the observation that two female children periodically played in the yard of respondents (App. 13).

Apparently, as an afterthought, Los Angeles Police decided to intercept the garbage truck as it approached 1901 Nolden, stopping it before one of the homes on the street. No information was in the possession of the police which in any way indicated that Respondents' garbage can was utilized by them to dispose of contraband or in any other way played a role in the lives of respondents save to dispose of routine refuse.

It is clear that petitioners could never have obtained either a warrant of search or a warrant of arrest for respondents based on the anonymous "tip" of an untested, unreliable, anonymous telephonic informant. First, the anonymous informant was prima facie unreliable; second, nothing was proffered by the informant to indicate that he spoke with personal knowledge of the events alleged to have occurred at 1901 Nolden, Los Angeles, California. As such, no search warrant or arrest warrant could possibly have issued under the deicisions of

this Honorable Court, *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *Whiteley v. Warden, Wyoming State Penitentiary*, 401 U.S. 506 (1971) or under the decisions of the Supreme Court of California, *People v. Hamilton*, 71 C.2d 176 (1969), *Halpin v. Superior Court of San Bernardino County*, 6 Cal.3d 885 (1972).

It appears that petitioner California seeks to accomplish without a search warrant what it could not accomplish had it sought a search warrant.

Respondents assert the following contentions and argument, which will be developed and supported by federal and state authorities:

I.

AS TO PETITIONER'S FIRST QUESTION PRESENTED:

A. Respondents contend that they had a reasonable expectation of privacy in their trash container against police initiated search and seizure based upon several theories:

1. In general, respondents contend that the average citizen depositing refuse in a trash can reasonably believes that said refuse will be picked up by garbage haulers and mixed indistinguishably with other refuse and taken shortly to a dump where it is either burned, or as is its fate in Los Angeles, California, plowed under to form the basis of fill for housing developments. If respondents are argued to have "abandoned" their trash, they have given it up solely to garbage haulers with the expectation they will carry it straight to a regulated disposal area. Respondents contend that garbage haulers are not reasonably believed to be the agents of police and do not

usually have the time or inclination to sift through brown opaque bags containing garbage to look for contraband within the meaning of *Stoner v. California*, 376 U.S. 483 (1964) and *Chapman v. United States*, 365 U.S. 610 (1961).

2. Mathematically, respondents contend that the law of probability suggests that indiscriminate searching of the nation's 'garbage cans for contraband is a futile endeavor and, therefore, not an occurrence of reasonable expectation. The ratio of police to garbage cans is minuscule and therefore, the use of police manpower for such purposes would be neither logical nor workable as a crime detection scheme. Based on sheer statistics and mathematical probability, the likelihood of locating contraband in a given can in a given city on a given day is antithetical to a logical contention that such searches and seizures are reasonable. Indeed, the reasonable expectation is the opposite—to wit, a given can will be immune from police search on a given day. Consideration by a citizen of mathematics and scientific fact decrees a reasonable expectation of privacy and complete immunity from search in this manner.

3. Respondents contend that local Los Angeles City and County ordinances *FORBID* the collection, tampering or pick-up of trash and garbage by any other person except licensed and bonded collectors, and respondents thereupon base one of their contentions that it is unreasonable to presume that these licensed and bonded collectors would violate these ordinances by allowing police search and seizure of and from the garbage. Further, it is unreasonable to believe the garbage haulers would themselves become agents of the police to aid in the scheme of search and seizure within the meaning of

Stoner v. California, 376 U.S. 483 (1964) and *Chapman v. United States*, 365 U.S. 610 (1961).

4. Respondents, governed by these same ordinances, contend that they were required to dispose of their trash in a certain manner in order to comply with the law by placing said refuse in cans at curbside just prior to pick-up by licensed haulers in licensed trucks. Respondents moved their trash cans to curbside, away from, but contiguous to their home and environs, solely because they were compelled to so do within the meaning of Sections 1706 of the Los Angeles County Ordinances and 66.02(c) of the Municipal Codes of Los Angeles.

Respondents were entitled to, and did, reasonably rely on the existing Los Angeles County and Municipal garbage collection statutes in that they consequently and reasonably expected that their garbage can and its contents would remain private and would not be subject to tampering by anyone, and that when picked up, would be hauled to a dump and indistinguishably and anonymously disposed of, within the meaning of Sections 17.10 of the Los Angeles County Ordinances and 66.03 and 66.28 of the Municipal Codes of Los Angeles.

In *Mancusi v. De Forte*, 392 U.S. 368, this Court alludes to a "reasonable expectation of freedom from governmental intrusion". Respondents' contentions as to protections provided them by the local garbage ordinances, within the meaning of the Ninth and Tenth Amendments to the United States Constitution are exactly founded upon such reasonable expectation of freedom.

(5) a. Respondents contend that they are entitled to privacy in their trash cans and the contents thereof, and that they sought to maintain privacy in their refuse in

probably the only reasonable way available to them. They placed their refuse in brown opaque paper bags which they then placed in their private, covered garbage container within their home, and on its porch, moving the can to curbside only immediately before the scheduled pick-up. Under California law, a search warrant is required to search into closed opaque containers, within the meaning of key decisions of the California Supreme Court.

> "It is inherently impossible for the contents of a closed, opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant. . . ." *People v McGrew*, 1 Cal. 3d 404, 410. (See also *People v Marshall*, 69 Cal. 2d 51, 59.)

Garbage cans remain the property of the citizen, Section 66.02 of the Los Angeles Municipal Codes, and are to be returned to the citizen's home subsequent to being emptied by the trash collectors. No one would imagine that a citizen gives up his rights to ownership of his trash containers all or in part, to anyone, when he puts out his trash. The trash container, therefore, could be viewed as a "portable" part of the house itself–stretched from the curtilage for the temporary purpose of garbage disposal.

While the cited ordinances prohibit anyone but licensed garbage collectors from tampering with one's trash, it is clear that the owner of the trash container himself could, at any time, rummage through his own trash container, even after he has placed it at curbside, to, say, retrieve something discarded in error. It could not be reasonably argued that he would have to return the trash container to his own yard in order to look through it for such a purpose. No doubt, one of the reasons for the

enactment of ordinances preventing tampering is to allow such security to the trash disposing citizen.

This right of a citizen to retrieve items from his own trash would, as a practical matter, end when his trash had been commingled with the trash of others in the trash truck. Not only would it be unwise from a public health standpoint to permit a citizen to wallow around in a mass of other people's garbage, (assuming a citizen who could tolerate such a search from a personal standpoint), but it would interfere with the timely disposal of the trash of others by interfering with the work schedule of the garbage haulers. Furthermore, Respondents contend, it would be an impermissible invasion of the right of privacy of other citizens, presumably his neighbors, were he permitted to make such a search.

It would seem then, that a citizen reasonably expects that his trash will be his own until such time as it is comingled.

b. Respondents did not reasonably "accept the risk" that trash collectors would cooperate with police in search of their trash cans. In particular, Respondents in no way "confided" their "wrongdoing" to trash collectors, for the obvious and prima facie reason that the trash collectors were oblivious of anything concerning respondents or their activities even presumably when the police made demand for their cooperation in searching respondents' trash. In this sense, *United States v. White*, 401 U.S. 745 (1971) and *Massiah v. United States*, 377 U.S. 201 (1964) are inapposite. See also *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

c. Respondents contend that this Court has recognized that the intimate facts and activities of the marital bedroom and the marriage relationship, as it affects birth

control and contraceptives, should be protected under the concept of right to privacy. *Griswold v. Connecticut*, 381 U.S. 479 (1965). This Court said:

> "... would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship...."

Respondents suggest that a married couple should likewise be protected in their garbage should they wish to conveniently and privately dispose of birth control materials via this means. If one thing is protected in garbage, all things should be as well, especially if wrapped in opaque coverings for disposal.

B. Further, respondents argue and contend that under such decisions of the Supreme Court of the United States as *Cooper v. California* (1967), 386 U.S. 58, the Supreme Courts of the states and the state legislatures may create more stringent Fourth Amendment regulations than required by the Federal Constitution. This the Supreme Court of California has done in *People v. Edwards*, 71 Cal.2d 1096 (1970) and *People v. Krivda*, 5 Cal.3d 357 (1971); see also *People v. Martin*, 45 Cal.2d 755 (1955), and *Kaplan v. Superior Court*, 5 Cal.3d 525 (1971).

C. In addition, respondents argue and contend that the decision of the Supreme Court of California in *People v. Krivda*, 5 Cal.3d 357 (1971) is based upon an independent and adequate state ground, unrelated to federal Fourth Amendment violations, in that municipal and county ordinances preclude such garbage can searches and seizures by unlicensed and unbonded personnel. As such, all recent decisions of this Honorable Court preclude this Court's assumption of jurisdiction to

even consider any alleged Federal question within the meaning of *Johnson v. New Jersey*, 384 U.S. 719 (1966) and *Minnesota v. National Tea*, 309 U.S. 551 (1940), as well as other similar authority. Thus, while there may be no right of privacy in abandoned property in general, the garbage of L.A. County is highly regulated, whether such garbage is deemed to be "abandoned" or not.

D. Respondents contend that petitioners' seeking of *relitigation*, constraint and diminishment of *Mapp v. Ohio*, 367 U.S. 643 (1961) is not proper before this Honorable Court because of the independent adequate state proscription against illegal searches and seizures found in Article 1, Section 19 of the Constitution of California, and because of the decision of the Supreme Court of California in *People v. Cahan*, 44 C.2d 434 (1955), where the High Court of this state expressed and formalized the suppression sanction in this state not only as an independent State Court interpretation of the Constitution of California, but as an evidentiary rule as well. See also *People v. Bradley*, 1 Cal.3d 80, 84 (1969).

E. Finally, respondents contend that the concepts of "abandoned property" and "agency" are passé and have been abandoned by this Honorable Court in such decisions as *Katz v. United States*, 389 U.S. 347 (1967). As a result, decisions such as *Hester v. United States*, 265 U.S. 57 (1924), and *Abel v. United States*, 362 U.S. 217 (1960), are no longer persuasive, and were not and could not be reasonably relied upon either by police, garbage haulers, respondents, or the California Supreme Court. Only *Katz v. United States, supra*, and applicable Los Angeles County/City ordinances could be realistically relied upon by anyone. The latter were relied upon by respondents in expecting reasonable privacy in their trash can and its contents. See also *Bielicki v. Superior Court*,

57 C.2d 602 and *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968).

The case of *Hester v. United States*, 265 U.S. 57 (1924), relied upon by the petitioner, is *not* inconsistent with the criterion of reasonable expectation of privacy. In *Hester*, fleeing defendants dropped illegally made alcohol virtually in the presence of pursuing officers in "open fields". Clearly, one could hardly expect "privacy" therein, for "what one knowingly exposes to the public", as in *Hester*, hardly bespeaks of reasonable expectations of privacy. *Hester*, therefore, is not necessarily inconsistent with the newer and current concept of "reasonable expectation of privacy". *Katz v. United States*, 389 U.S. 347 (1967).

Abel v. United States, 362 U.S. 217 (1960) presents slightly different circumstances. *Abel* was decided under the "abandonment of property" theory, since supplanted by the "reasonable expectation of privacy" concept. Moreover, it would appear that the items left in the waste basket in *Abel* were not themselves concealed in opaque containers, as in the case sub judice. It would further appear that in *Abel, supra*, no local ordinances were in effect which regulated trash pick-up and precluded unauthorized persons from tampering with trash containers, such as are present in the case at bar, and which provide an independent and adequate state basis for the decision of the Supreme Court of California.

II.

AS TO PETITIONER'S SECOND QUESTION PRESENTED

Respondents contend that any attack in the area of legality of search and seizure should be directed in thrust at either the Fourth Amendment to the United States Constitution itself, or to reversal of the decision of this Honorable Court in *Wolf v. Colorado*, 338 U.S. 25 (1949). It is illogical and unworkable to maintain viability of the Fourth Amendment and *Wolf, supra*, and concomitantly urge a reversal of the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961).

Further, respondents contend that the independent and adequate state basis of Article 1, Section 19 of the Constitution of the State of California precludes this Honorable Court from assuming jurisdiction, and certiorari was improvidently granted. *Miller v. California*, 392 U.S. 616 (1968).

Respondents suggest that even among petitioners and their *Amicus Curiae*, great confusion and misapprehension occurs. California suggests the average reasonable policeman should be able to decide when to search and seize (Pet. Br. 51). *cf. Coolidge v. New Hampshire*, 403 U.S. 443; *Johnson v. United States*, 333 U.S. 10, 13-14. Yet California feels the law of search and seizure is so esoteric, so replete with nuances, that police officers in the field have difficulty deciding when they may search, partly because of inadequate education of police with respect to legal theory, and partly because of partiality and conflict of interest as regards field law enforcement aims. Furthermore, as pointed out in petitioner's Brief, minimal educational levels as prerequisite for employment of police officers lends weight to this argument.

(Pet. Br. 49-50). The Americans For Effective Law Enforcement in their *Amicus Curiae* Brief (Pages 11 thru 20) suggest, on the other hand, that brilliance of the police in knowing when they can search and seize, being upheld 84% of the time, militates toward a conclusion that the exclusionary rule is no longer needed.

Respondents suggest that the foregoing 180 degree out-of-phase reasoning is sufficient indication for the continued viability of the rule.

Further, respondents contend that this Honorable Court has streamlined search and seizure decisional problems by enunciation of a general principle in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971). This principle forecloses seizure and search of petitioners' trash can without a search warrant or unless conducted contemporaneously with and geographically contiguous to an arrest based on probable cause. *Chimel v. California*, 395 U.S. 752 (1969). *Shipley v. California*, 395 U.S. 818 (1969); *Vale v. Louisiana*, 399 U.S. 30 (1970).

Respondents contend that the decisions of the California Supreme Court in *People v. Edwards*, 71 Cal.2d 1096 (1969) and *People v. Krivda*, 5 Cal.3d 357 (1971) should be affirmed as decisions fully within the sole jurisdiction of the states and foremostly based on sound judicial reasoning and scientific fact. Respondents suggest and contend that the domestic garbage can is sufficiently an adjunct to the home to be accorded the full panoply of search and seizure protection granted to the domocile itself, especially in light of argument above with respect to continued ownership, dominion and control of garbage cans.

"... Columnist Jack Anderson, whose agents assiduously went through Hoover's trash cans recently in an exercise of exceptionally personal journalism, confirmed that he liked to drink Jack Daniels..."

Hoover, said (President) Nixon, (in delivering the funeral eulogy)... "... was one of the giants, a man who helped keep steel in America's backbone, and the flame of freedom in America's soul..."

The Long Reign of J. Edgar Hoover; Time Magazine, Page 19, May 15, 1972.

ARGUMENT

I.

RESPONDENTS WERE, UNDER CALIFORNIA LAW, ENTITLED TO A REASONABLE EXPECTATION OF PRIVACY IN THEIR PRIVATE TRASH CONTAINERS WHILE THOSE TRASH CONTAINERS WERE ADJACENT TO THE HOME. *PEOPLE v. EDWARDS*, 71 C.2d 1096 (1970). MERELY MOVING THEM FROM THE HOME AND ITS ADJACENT CURTILAGE/ ENVIRONS TO THE CURB TO EFFECTUATE PICK UP DID NOT ALTER THE REASONABLE EXPECTATION OF PRIVACY; RESPONDENTS "ABANDONED" THEIR TRASH SOLELY TO TRASH COLLECTORS, WHOSE ACTIVITIES WERE BOUND AND REGULATED BY STATUTE, AND TO NO ONE ELSE.

As noted elsewhere in this brief, even though other state jurisdictions have reached conclusions contrary to the ruling of the California Supreme Court, and even though there is a conflict in the Federal Circuit Courts of Appeals on this subject, the Supreme Court of California remains free to create a higher level of protection for California citizens in rights under the Fourth Amendment, in this case to decide that they have a reasonable expectation of privacy in private residential trash containers and their contents, even though not mandated by the Federal Constitution. *Cooper v. California*, 386 U.S. 58 (1967).

Moreover, as shown elsewhere in this brief, independent and adequate state grounds of non-federal nature support the ruling of California's High Court. The dual independent state grounds are Article I, Section 19 of the California Constitution along with *People v. Cahan*, 44 C.2d 434 (1955), and Los Angeles County/ Municipal ordinances governing garbage disposal and the

interference therewith by unauthorized persons. Because of this independent duality of adequate and independent state grounds, this Court, under a host of its own decisions, is deprived of jurisdiction to adjudicate an alleged concomitant federal error. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Minnesota v. National Tea Co.* 309 U.S. 551 (1940).

Respondents assert herein that manifold logical reasons point to a reasonable expectation of privacy in a private trash can.

Initially, one is faced with a serious question of equal protection of the law for all citizens of a given State or County. Equal protection of the law should not depend on the architectural idiosyncrasies of a residential home, apartment, street, or alley, which, under codes, fixes the location of garbage deposit and collection. Nor, respondents contend, should equal protection of the law depend upon environmental characteristics of a community, such as air pollution, which give rise to statutory proscriptions against burning of trash by individuals, and which thereby make mandatory disposal of trash by methods and procedures adopted for the health of the community and the convenience of the Sanitation Department.

Thus, while some homes provide enclosed porches for garbage cans, clearly part of the home itself, other garbage cans are relegated to an open area adjacent to the rear entry to the home. *People v. Edwards*, 71 C.2d 1096 (1970). Still others are placed permanently a foot or so off the property in a rear alley. Some multiple unit apartment dwellers are provided only with a single large common trash bin, foreclosing individual privacy immediately upon trash deposit but concurrently assuring

anonymity of trash upon initial commingling. While other examples could be cited, it should be apparent that many facilities for the disposal of trash are forced upon the citizen. He can do nothing about the laws which govern disposal of his trash, nor can he do anything about the facilities. In an adjacent rural area, farm residents, on the other hand, may have plenary control over their trash disposal. The perturbations and combinations are significant in number and suggest that severe equal protection problems are in the offing should America's citizens not be afforded protection against either indiscriminate and random, or specifically directed, warrantless searches and seizures in and of their trash barrels and the contents thereof.

Merely echoing that "trash is abandoned property", and "abandoned property has no expectation of privacy" begs the question and misses the philosophical and constitutional issues as viewed from the vantage point of what is reasonable for a citizen to expect as to privacy in residential trash containers.

At the threshold, respondents flatly suggest that if the citizens of this nation be polled completely, few if any citizens would state that they would expect their trash cans to be searched, routinely and randomly, or with specific intent, by law enforcement officers without a search warrant. This appertains from manifold reasons, two of which will be treated:

A. The Knowledge Possessed by Citizens of California Relative to the Facts of Garbage Pick-Up.

Average citizens in Metropolitan areas have seen huge garbage trucks rolling down their streets, workers hurriedly jumping from the yet moving trucks to grab the several containers holding a week's accumulation of refuse. Because of obvious sparseness of time and the significant number of homes visited by them, these workers quickly dump the containers into the cylindrical "wells" from which the trash is hydraulically swept and compressed into the cavernous inner recesses of the trucks.

Both the exigencies of time and a lack of interest in stinking, putrid refuse, containing everything from used Kotex, disposable baby diapers, and overripe fruit, literally covered with maggots, to discarded personal letters, perused, dog-eared old magazines and junk mail, operate to cause these harried and muscled sanitation workers to rapidly propel such vile matter into the gaseous anonymity of the bellies of their huge mechanical scavengers. Few Los Angeles residents have not had the experience of watching neighbors, at the last opportunity to catch the truck, gallantly struggling to pull their garbage cans from the protective environs of the home onto the curb, having forgotten to do so previously. The point is that the even minimally alert and cognizant citizen expects, *knows*, that the usual garbage hauler has neither the time nor interest to conduct a "search". or a "view" of the individual garbage can, and he has a reasonable expectation of privacy in that he therefore expects, *knows*, that refuse there deposited will flow in an uninterrupted manner out to the dump where it will

be burned and/or plowed under by a bulldozer. Counsel can only believe that petitioners are oblivious to the techniques of trash collection in metropolitan areas if they in any way believe it reasonable to expect that police, soliciting the aid of the garbage haulers themselves, will intercept the trash somewhere in the disposal process and grovel and rummage through it like hungry, stray dogs in search of remnants of putrid meat. Reality is to the contrary, and reality governs reasonableness.

Just as surely founded in reality is the fact that the odds militate against a search of a residential Los Angeles garbage can by police or others acting as police agents. The *reality* suggests a lack of reasonable expectation that police or their agents will search a given arbitrary trash can.

Of course, if reasonable and probable cause exists to support search of a given garbage can and/or its residential environs, that is quite another issue, and the constitutionally preferred method is via the search warrant issued and supported by affidavit. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

It must be remembered that the first of the two questions proffered by petitioners is:

> "Whether a person who deposits contraband in a trash receptacle which he places on public property adjacent to a street, for the purposes of removal by a municipal trash collector, exhibits a reasonable expectation of privacy that such contraband will not be viewed inside the bin of a garbage truck at some distance from the place of pick-up and prior to the commingling of the contraband with the trash of other persons."
> (Petition for Certiorari, page 2; Opening Brief, page 2.)

In examining this certified question in detail, Respondents suggest the following irrefutable axioms of reality:

Few persons, if any, who are legally and bona fidely, by ordinance, able to collect Los Angeles County garbage, would recognize "contraband" if it stared them in the face under pleasant circumstances with ample opportunity to reflect upon it. Fewer yet would care to take the time to contemplate whether something was "contraband", especially when the occasion for such contemplation is shared with assaults on the olfactory senses as are precipitated by the odors of mouldy cheese, cat-sand and its harvest, and decayed food–all assuming an absence of the harried circumstances of attempting to meet a garbage pick-up schedule.

Counsel for respondents, experienced trial lawyers who have defended dozens of illegal narcotics cases, have found that not even professional chemists with university degrees in chemistry "recognize contraband" absent laboratory tests for same. The usual garbage hauler has not had the benefit of a university degree nor its accompanying educational privileges, and *reality* and *reasonableness* suggest a 99.44% unlikelihood of his even suspecting contraband in the course of his occupational activities, carried out under the previously described conditions. There is a similar unlikelihood that he would then "view it" inside of the bin of the truck "some distance from the place of pick-up and prior to the commingling of the contraband with the trash of other persons. . . ."

(Petition for Certiorari, page 2; Opening Brief of Petitioner, page 2).

As indicated, the *reality* of garbage pick-up is attempting to meet a rigid schedule, quickly stopping,

grabbing heavily laden cans, dumping them and quickly elevating the garbage from the "well" or "bin" of the truck into the interior of the truck prior to leaving the situs of pick-up. Thus, *no* distance obtains between situs of pick-up and the place where the act of "commingling of the contraband with the trash of other persons" occurs. To assert that the average garbage hauler has the time or interest or inclination to wallow like a dog in the garbage in the hydraulically operated "well" of the modern sanitation truck insults the intelligence. The "reasonable expectation" of such a hardy soul would be that he would be quickly elevated, hydraulically, by the driver of the truck into the darkened inner recesses of the truck itself, where his scrutiny of the garbage would be the more challenging due to his resulting diminished visual acuity and more pungent odors contacting his olfactory nerves.

Because reality must and does usually govern what is reasonable, respondents suggest that the answer to question 1, proffered by the petitioners, must be a resounding "Yes". The depositor of either contraband or non-contraband in a private garbage can does possess such a reasonable expectation of privacy under the deliniated and certified circumstances presented by petitioners in their question.

Of course, if police or police agents trained in contraband detection solicit the garbage hauler and intercept the garbage, other results may appertain. But the reality, and consequently the reasonableness, of this alternative dictates otherwise. It seems well settled by two major decisions of this Court that it is unreasonable to expect either hotel managers or landlords to lead police on a search of premises rented or leased. *Stoner v. California*, 376 U.S. 483 (1964); *Chapman v. United*

States, 365 U.S. 610 (1961). Similarly, it is surely just as unreasonable to believe and expect that garbage haulers will become police agents, and in fact participate with police by allowing police to ransack garbage as it lays in the "well" or "bin" of the truck. It is clear that the examination must be conducted in the "well", or the "bin", before the refuse is elevated inside the truck. Once inside, the matter is of course commingled. In any event, the petitioners certify in their question for ruling by this Court the factual situation of viewing of the material *while it is in the "well", or "bin"* of the truck, and at no other place.

Clearly, existing law protects *persons*, not places. *Katz v. United States*, 389 U.S. 347 (1967). Under the concept of a reasonable expectation that the garbage will remain untampered with, respondents had an expectation of privacy in the can itself near the home, at the curb, in the well for the few seconds that it be there, and into the inner recesses of the truck after elevation, all based on the reasonable knowledge that there is no reasonable opportunity for interference with the process, unless the haulers are coerced or enticed into deviating from their duties as set out in the ordinances in Los Angeles, City and County.

While, in general, "abandoned" property may not be protected, Los Angeles garbage is protected by statute and county/municipal ordinances, Article I, Section 19 of the State Constitution, and *People v. Edwards*, 71 Cal.2d 1096 (1970), a State Supreme Court decision never successfully challenged in or reversed by this Honorable Court.

The United States Court of Appeals for the 9th Circuit in *Corngold v. United States*, 367 F.2d 1 (1967) has recognized that one may "give up" personal matter to another for a particular purpose, and the mere depositing

of that matter with the other person, or system, does not signify an abandonment for an allowance to search the material entrusted. (No right to search appellant's package left at TWA terminal for shipping.) In *Corngold, supra,* appellant did not "abandon" his package, and merely surrendering it for a specific purpose did not suggest "abandonment".

When one deposits mail in a United States mail box, his reasonable expectation is that it will be picked up by postal employees and delivered; he does not expect it to be searched and read by government agents. Likewise, a party shipping something via common carrier has given up possession of it and may never expect to see it again. He has done so, however, for a specific reason. In the case at bar, respondents gave up possession of their garbage for a specific reason to a specific person to accomplish a specific purpose and none of the foregoing included acquiescence or expectation of a police search.

Work v. United States, 243 F.2d 660 (D.C. Cir. 1957) held that the placement of marijuana in a trash can located a few feet within the back door of defendant's home was not an abandonment unless as to persons, such as trashmen, authorized to remove the contents of the receptacle. The foregoing rationale is apropos of respondents' contentions; the garbage is "abandoned" only to the trash collector.

Petitioner essentially acknowledges that a trash can located proximate to the home may be protected as "within the curtilage" (pages 17-21 Opening Brief). The *entire* California Supreme Court so recognizes in *Krivda,* 5 Cal.3d 357 (see dissent). What seems to create the illogical reasoning on the part of the three-man dissent is the forced requirement to carry the can to the curb to effectuate collection; this act is said to create the

"abandonment". Such reasoning is an intellectual non-sequitur.

While the trash in the case *sub judice* was examined "some distance" from the home, it was only done so at the instigation of the police in directing the haulers of the garbage to drive away from the situs of pick-up. Also, the fact that the examination was accomplished in the "well" or "bin" was only the result of the police ordering the collectors to deviate from their required procedures by refraining from elevating the trash into the truck. Were it not for the two foregoing commands, the trash would have been lost for examination purposes immediately at the pick-up situs.

On the merits of the factual circumstances, respondents possessed a reasonable expectation of privacy in their private trash containers.

B. The Mathematical Probability of Any Arbitrary Garbage Can Containing Contraband

Respondents here note that either one of two possibilities are in existence:

1. The police have information which brings them to a specific garbage can location. If they have sufficient *valid* information to support probable cause to obtain a search warrant, they should then proceed to obtain the search warrant and, having done so, may then search a garbage can, either with specificity or perhaps as an adjunct to the general right to search the home, garage, outbuildings, etc. The obtaining of the search warrant is of course the preferred way to proceed and any other search is inherently unconstitutional, subject, of course, to *Post Facto* justification by the police according to well established law. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

2. The police have *no* information at all that a given garbage can contains contraband; they search it at random in an effort to "combat crime" or conduct routine "raids", at random, hoping to find contraband.

Respondents' thesis is simply that 1. above *always* demands a search warrant while 2. above is mathematically unworkable from the standpoint of the science of mathematical probability and statistics. It is, therefore, inherently unreasonable to believe that it would occur. Because of its probabilistic unlikelihood of occurrence, respondents would have a reasonable expectation of privacy in their domestic garbage can.

In 1. above, elementary constitutional law is set forth in a host of decisions of this Honorable Court and the Supreme Court of California. When a search warrant can be obtained, that process is required. Under *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2047 (1971), it is one of the two mandatory means now available to effect a seizure.

In 2. above, basic mathematical probability is utilized. It may be illustrated by a simple example: The probability of rolling any given number on a die is 1 in 6; the probability of rolling that given number on two consecutive rolls is (1/6) (1/6) = (1/36), i.e., the *product* of the individual probabilities. It is important to recognize that the events studied must themselves be *mutually independent*, and if they are not, the "product rule" of individual probabilities is erroneous. Using the above method of analysis, it can be demonstrated mathematically that the probability of any given garbage can being located and searched "successfully" is so minuscule as to suggest that any given citizen does indeed have a reasonable expectation of privacy in his garbage can. (See Note 1, page 1a, Appendix.)

The Supreme Court of California has rejected the notion that probabilities can be used to establish guilt beyond a reasonable doubt–absent sound bases for the use of statistics. *People v. Collins*, 68 Cal.2d 319, 68 A.C. 329. There is, however, no reason to reject them when they are proffered in the realm of reasonable expectation of privacy. They are, assuming *reasonable* data, mathematically irrefutable.

Respondents suggest that not only the non-mathematical expectation of the citizens of this nation that they have garbage can privacy, but the mathematical one as well, fully portends a reasonable expectation of privacy in the domestic garbage can.

See also, Tribe, "Trial By Mathematics: Precision and Ritual in the Legal Process", 84 Harvard Law Review 1329 (1971); *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 2028, fn. 2.

More significantly, under the question before the Court, confining the issue of the reasonable expectation of privacy to the condition:

> "... that such contraband will not be viewed *inside the bin* of a garbage truck at some distance from the place of pickup and *prior to conglomeration* of the contraband with other trash ...",

respondents suggest that this additional limitation adds additional, mutually independent factors. (See Note 2, page 4a, Appendix.)

Scientifically, the citizens of America have much more than a reasonable expectation of privacy; the expectation of privacy is established beyond a shadow of a doubt.

The decision of the Supreme Court of California in *People v. Krivda*, 5 Cal.3d 357 (1971) should be affirmed.

II

UNDER THE LAW OF THE STATE OF CALIFORNIA, AS ENUNCIATED BY THE SUPREME COURT OF CALIFORNIA IN SUCH CASES AS *IRWIN V. SUPERIOR COURT* (1969) 1 CAL.3D 423, "ABANDONMENT" HAS A SPECIAL DEFINITION–WHAT CONSTITUTES "ABANDONMENT" IN CALIFORNIA IS NOT A CONSTITUTIONAL ISSUE WHICH MAY BE REVIEWED BY THIS HONORABLE COURT, IT BEING IN THE REALM OF LOCAL PROPERTY LAW, CLEARLY NOT OF FEDERAL DIMENSION. THE DECISION OF THE CALIFORNIA SUPREME COURT THUS IS, ONCE AGAIN, SUPPORTED BY INDEPENDENT AND ADEQUATE STATE GROUNDS.

Petitioner California suggests that "Property Law concepts, however, are not wholly irrelevant to an analysis of the scope of constitutional protection afforded by the Fourth Amendment . . . " (Pet. Op. Br., page 14).

While quoting from Law Review articles, lower Federal Courts, and the law of New York (Pet. Op. Br., pages 14-20), petitioner totally fails to acknowledge the definition of "abandonment" under California Law; petitioner fails to acknowledge that "property" concepts are, in general, of non-constitutional dimension, and, therefore, what the California Supreme Court says concerning property and abandonment is the sole concern.

Respondents severely take issue with petitioner's contention that they "abandoned" their garbage.

Under California law, as enunciated once again by the California Supreme Court (*Irwin v. Superior Court*, 1 Cal.3d 423, 429, 82 Cal. Rptr. 484, 462 P.2d 12), "The Rule has always been, as repeated in *Martin v. Cassidy* (1957) 149 Cal. App.2d 106, 110 that:

Abandonment is defined as the voluntary giving up of a thing by the owner because he no longer desires to possess it or to assert any right or dominion over it *and is entirely indifferent as to what may become of it or as to who may thereafter possess it.*" (Emphasis added)

It is the italicized portion of the foregoing definition which respondents assert to be of governing significance. Clearly, respondents were not indifferent as to the fate of their garbage, expecting that law enforcement would *not* tamper with it; clearly, as well, respondents were not indifferent as to who thereafter might possess it, reasonably expecting that only garbage haulers would exercise temporary possession of the garbage enroute to its ignominious end in the city dump. At no time was police intervention contemplated.

It should be noted here that in the general sense, the expectation of privacy in trash must be considered from the standpoint of what the general citizenry expects. The court could take judicial notice of the fact that the average citizen is not, indeed, indifferent to what may become of the highly personal and revealing tracings of his life's activities.

Hence, again, under California State law, an independent and adequate state criterion for "abandonment" bespeaks of a reasonable expectation of privacy in respondent garbage. The Supreme Court of California's decision in *People v. Krivda*, 5 Cal.3d 357 should be affirmed.

III

UNDER CALIFONRIA CASE LAW THERE IS A PROHIBITION TO A SEARCH INTO CLOSED, OPAQUE CONTAINERS WITHOUT A SEARCH WARRANT; THIS PRECLUDES A SEARCH INTO BROWN PAPER BAGS IN RESPONDENTS' TRASH BARREL, ITSELF A CLOSED OPAQUE CONTAINER. WITHIN THE MEANING OF *COOPER V. CALIFORNIA*, 386 U.S. 58, 62; 87 S.CT. 788, 791 (1967), THE STATES MAY PROVIDE MORE EXTENSIVE SEARCH AND SEIZURE PROTECTION THAN MANDATED BY THE FEDERAL CONSTITUTION; THE SUPREME COURT OF CALIFORNIA HAS THUS PROVIDED AND THEIR EXTENSION IS NOT SUBJECT TO BEING SET ASIDE BY THIS HONORABLE COURT.

As respondents have noted in many other places in this Brief, this Honorable Court has clearly held that the Fourth and Fourteenth Amendments impose *minimum* criteria on the states in the area of search and seizures.

The states, acting via their respective Supreme Courts, or via their own Constitutions, can provide more extensive protection for their citizens. *Cooper v. California*, 386 U.S. 58, 62; 87 S.Ct. 788, 791 (1967).

It is well established under a host of decisions of the California Supreme Court that a search into an opaque closed container may be carried out only with a search warrant. *People v. Marshall*, 69 Cal.2d 51, 59; *People v. McGrew*, 1 Cal.3d 404, 409-410, wherein the Court said:

> "It is inherently impossible for the contents of a closed opaque container to be in plain view regardless of the size of the container or the material it is made of. A search of the container is necessary to disclose its contents. A search demands a search warrant . . . ."

Respondents clearly evidenced their expectation and desire of privacy in their garbage can by placing a lid on the closed, opaque container. Within the can, respondents placed their trash in brown opaque paper bags, closed at the top. Only by entry initially into the can and, secondly, into the bags themselves, could any material placed in the can be examined. This was done initially by garbage haulers acting as police agents in violation of the meaning of *Chapman v. United States*, 365 U.S. 610 (1961) and *Stoner v. California*, 376 U.S. 483 (1964), and, secondly, by police themselves examining the contents of the bags in the "well" or "bin" of the truck. Each act violates California Supreme Court authority, and the prohibition against tampering with the trash cans established by Los Angeles County/Municipal ordinances, so cited.

The latter prohibitions against search into closed opaque trash cans and the tampering therewith are valid, adequate and independent state bases to support the ruling of the California Supreme Court. *Cooper v. California*, 386 U.S. 58; *Minnesota v. National Tea*, 309 U.S. 551; *Johnson v. New Jersey*, 384 U.S. 719.

It must be emphasized that the foregoing California law is not confined to objects of opaque nature in the home. The California Supreme Court has applied it to airline shipments, for example, when they were deposited for shipment at the airport. *People v. McGrew*, 1 Cal.3d 404 (1969); *Abt v. Superior Court*, 1 Cal.3d 418 (1969); *Irwin v. Superior Court*, 1 Cal.3d 423 (1969); see also *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966).

Under California law, as enunciated by the California Supreme Court, *Abt. v. Superior Court*, 1 Cal.3d 418, 421 (1969), reaffirming its power to provide more adequate protection under the Fourth and Fourteenth

Amendments, and under Article I, Section 19 of the California Constitution:

> "... The probability that a carton of brick-shaped tinfoil wrapped packages will contain marijuana is not sufficient to justify a search without a warrant...."

The foregoing authority stands as a general principle in California Search and Seizure Law, not only under Article I, Section 19 of the California Constitution, but further, as a rule of statewide evidentiary procedure. *People v. Cahan*, 44 Cal.2d 434 (1955). It is applicable under California State law to closed opaque garbage cans. *People v. Robert and Jennifer Edwards*, 71 Cal.2d 1096 (1970); *People v. Judith Krivda and Rodger T. Minor*, 5 Cal.3d 357 (1971).

The ruling of the California Supreme Court should be affirmed. The ruling rests on an independent and adequate state ground.

IV

COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971), PRECLUDES THE SEARCH OF A GARBAGE CAN WITHOUT A SEARCH WARRANT; UNLESS SUCH SEARCH IS MADE CONTEMPORANEOUSLY WITH AND GEOGRAPHICALLY CONTIGUOUS TO AN ARREST, BASED UPON PROBABLE CAUSE, SUCH SEARCH IS CONSTRAINED BY _CHIMEL V. CALIFORNIA_, 395 U.S. 752 (1969).

Respondents contend that this Honorable Court enunciated a principle that is to govern searches and seizures in the United States when it handed down its ruling in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Among the Court's purposes was a desire to simplify the often esoteric and murky world of search and seizure.

Respondents note that the Court particularly emphasized that the rule was simple enough to be understood by both the judiciary and police. That principle simply requires that the police refrain from searching any private property unless either a search warrant is first obtained or unless the search is conducted incident to an arrest based on probable cause. The latter situation, of course, is limited in scope by *Chimel v. California*, 395 U.S. 752 (1969) to a pat-down search of the person and to a search of area immediately within reach of the arrestee, from whence either evidence may be destroyed or a weapon obtained.

Obviously, neither condition of *Coolidge* was met in the case at bar, nor was the arrest made until much later and within the private home of respondents. It is elementary that an arrest can not be made within a private home and used to support a search of an area outside the home. *Coolidge v. New Hampshire, supra.* Nor can an arrest be made outside a private home and used to support a search made within the home. *Shipley v. California*, 395 U.S. 818; *Vale v. Louisiana*, 399 U.S. 30 (1970).

There was no probable cause to believe the can contained contraband, and thus the search can not be justified upon the rationale, often advanced, that permits an automobile search under the "mobility" theory, where probable cause exists to believe that the car might contain contraband. *Carroll v. United States*, 267 U.S. 132 (1925); *Preston v. United States*, 376 U.S. 364 (1964); *Cooper v. California*, 386 U.S. 58 (1967); *Dyke v. Taylor Implement Mfg. Company*, 391 U.S. 216 (1968); *Chambers v. Moroney*, 399 U.S. 42 (1970); *People v. Raymond Ross Laursen*, 22 Cal. App.3d 1033 (1972); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

This Court stated in *Coolidge, supra:*

> " . . . we are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily understood and applied by Courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police and a principle that preserves and protects the guarantees of the Fourth Amendment." (91 S.Ct. 2022, 2047).

This principle, taken alone, precludes the search and seizure of respondents' garbage can and its contents.

Where respondents have a reasonable expectation that their garbage can and its contents will not be tampered with by unauthorized individuals or in an unauthorized manner, the garbage can may only be entered via the preferred search warrant procedure. *Katz v. United States*, 389 U.S. 347 (1967). This Fourth Amendment principle has been recognized and applied by the Supreme Court of California, *People v. Krivda*, 5 Cal.3d 357 (1971); *People v. Edwards*, 71 C.2d 1096 (1969). If Cifornia desires to accord higher Fourth Amendment protection to its citizens, it may do so even though not mandated by the Federal Constitution. *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791. If California supports the instant result on an independent and adequate state basis, this Court can not assume jurisdiction to decide alleged Federal issues. *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 1782 (1966); Los Angeles Municipal/County Ordinances; United States Constitition, Amendments IX and X.

The search and seizure were unconstitutional, and it is difficult to escape from that conclusion.

Further, it must be called to this Honorable Court's attention that the Supreme Court of California has promulgated its own reasonable expectation of privacy rule. *People v. Edwards*, 71 Cal.2d 1096 (1970). In *People v. Bradley*, 1 Cal.3d 80, 84, the California High Court said:

> "... we believe that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and if so, whether that expectation has been violated by unreasonable governmental intrusion ...."

In view of this state promulgation, analogous to *Katz v. United States*, 389 U.S. 347 (1967), in the field of search and seizure, the instant decision of the California Supreme Court rests on an independent and adequate state ground and on an apparent willingness to extend higher protection in Fourth Amendment matters to California citizens than required by the Federal Constitution. Thus, California has given Fourth Amendment protection to the domestic garbage can under its own adaptation and/or creation of a reasonable expectation of privacy test. It is not for this Court to say that its action is constitutionally wrong.

V

NO THEORETICALLY PRODUCTIVE COMPARISON CAN BE MADE BETWEEN *HESTER V. UNITED STATES*, 265 U.S. 57 (1924), *ABEL V. UNITED STATES*, 362 U.S. 217 (1960), AND *PEOPLE V. KRIVDA*, 5 CAL.3D 357 (1971).

In its brief, petitioner argues that this court should rely on the holdings in *Hester v. United States*, 265 U.S. 57 (1924) and *Abel v. United States*, 362 U.S. 217 (1960) to support the rationale behind a finding that one does not have a reasonable expectation of privacy in one's trash.

An examination of those two cases reveals their inapplicability to the circumstances of the within case.

A.

In *Hester*, defendants were in flight from federal officers and were seen by those officers to throw several containers of illegally distilled whiskey into an open field. The "abandonment" terminology was utilized by the court in its opinion for reasons which are not totally clear to respondents.

Nevertheless, it is a dangerous foundation in reasoning to compare a patently suspicious act with a patently innocent one—quite apart from the issue of "abandonment."

The suspects in *Hester* could not, under any reasoning, be deemed to have been disposing of their whiskey in a commonly accepted fashion, mandated by statute. Theirs was the act of desperate men operating under the influences of a desperate situation.

B.

Despite the interesting reasoning utilized by the court in its opinion in *Abel*, it is clear that the fact situation was so entirely different, as in *Hester*, from the question

being considered by this Court as to render a comparison of the two matters fruitless.

Col. Rudolph Abel, master atom spy, was a guest at a Manhattan hotel when he was arrested by the Immigration and Naturalization Service. Abel was naked at the time of his arrest, indicating his obvious intention to remain, at least for the time being, as a guest in the hotel. A search was undertaken by four I.N.S. agents. Abel was directed to dress, to pack his things and to check out of the hotel. An accompanhing F.B.I. agent obtained his bill from the hotel and Abel paid it. He was then handcuffed and removed to I.N.S. headquarters.

Subsequent to his "checking out", his room was searched and the contraband sought to be suppressed was discovered in a waste basket in that room. That search was carried out with the permission of the hotel management. It is interesting to note that "the hotel practice was to consider a room vacated whenever a guest removed his baggage and turned in his key". (362 U.S. 217, 225.) It is clear that Abel was forceably removed from his hotel room and that the supposed "abandonment" of the items in his waste paper basket was at least suspect. It would be difficult to compare such a fact situation as *Abel* to that of the commonplace situation of disposing of one's trash in the ordinary and mandated fashion.

The Abel arrest and, later, search and seizure were carried out by two different police agencies for two ostensibly different reasons.[1] The first agency, the I.N.S.,

[1]Actually, the entire incident was contrived to effect a single purpose–to apprehend the number one Russian atom spy in the U.S.–at a time in American history (1957) when there was a wide-spread fear of Soviet nuclear aggesssion, when there was a jealously guarded disparity of nuclear capability in favor of the U.S., and when the "cold war" was still quite politically and

was used to clear the way for the second, the F.B.I., by forcing Abel to give up possession of the premises.

If the "abandonment" theory is to hold up at all, it clearly must presuppose Abel's lack of dominion and control over his hotel room. Were this not the case, that is, if it were still deemed to be his room, then the California case of *People v. Edwards*, 71 Cal.2d 1096 (1970) would operate to invalidate the search and seizure (assuming the state of the law presently extant in California for theoretical agrument only.)

Another important distinction is that the waste paper basket did not belong to Abel and was not a closed container, whereas, in the instant case, the covered trash can belonged to respondents, by statute, within the understanding of the police, and factually. There was no third party who had the right, apparent or real, to permit a police search in the instant case, whereas, possibly by contract between himself and the Hotel Latham, there was in *Abel*. Where such contractual relationship may have been permissive in *Abel*, statute mandated to the contrary in *Kirvda*, 5 Cal.3d 357 (1971).

It should be clear that had the court not found that Abel had "checked out", presumably voluntarily, a search warrant would have been required to search his room. To say that one operating under the direction and authority of the police was checking out "voluntarily", for the purposes of justifying a subsequent police search of his hotel room, would be akin to, say, "requesting" a suspect to give up his lease or execute a grant deed to his property in order that his residence may, thereafter be

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emotionally "hot". The importance of Col. Abel was subsequently demonstrated when he was swapped by the U.S. for U-2 Pilot Francis Gary Powers, himself a cause celebre in the USSR.

searched on the theory that he had "abandoned" its contents.

VI

THE DECISION OF THE CALIFORNIA SUPREME COURT IN *PEOPLE V. KRIVDA*, 5 CAL.3D 357 (1971) WAS BASED UPON AND SUPPORTED BY AN INDEPENDENT AND ADEQUATE STATE GROUND; AS SUCH, THIS HONORABLE COURT IS DEPRIVED OF JURISDICTION TO DECIDE THE FEDERAL QUESTION(S), IF ANY, THAT ARE ALLEGED TO BE IN ISSUE. MOREOVER, THE SUPREME COURT OF CALIFORNIA MAY ESTABLISH MORE STRINGENT FOURTH AMENDMENT REGULATIONS THAN COMPELLED BY THIS HONORABLE COURT AND THE FEDERAL CONSTITUTION.

In Amendments IX and X of the United States Constitution are found authority which governs the issue whether a municipality, county government, or other subdivision of a state may provide and enact legislation which forbids the action of police such as occurred in this case at bar, where the Federal Constitution has failed to provide.

They, therefore, create a separate and distinct state basis for a decision of a State Supreme Court which may, as in the instant case, preclude a search and seizure of the contents of a garbage can.

Amendment IX provides:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparge others retained by the People."

Amendment X provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

Article I, Section 19 of the California State Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

At Appendix A, page 1 of the Petition for Writ of Certiorari in the instant case appears the decision of the California Supreme Court in *People v. Krivda* (1971) 5 Cal.3d 357.

At page 11, the California Supreme Court notes:

> "The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public. To the contrary, many municipalities have enacted ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated. (See, e.g., Los Angeles County Ordinance No. 5860, Ch. IX, Sections 1611-1622, 1681-1691.) Moreover, these ordinances commonly prohibit unauthorized persons from tampering with trash containers (*Id.* §1710.) The provisions of these ordinances would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalks for collection."

In footnote 7, page 11, Appendix, Petition for Certiorari, the High Court of California notes the following:

> "Note also that ordinances governing trash collections may require the householder to place his trash barrels at the curb along the street in front of his house, at least in the absence of other arrangements

with the collectors. (*Id.*, §1706.) Thus, defendants placement of the barrels near the sidewalk was not necessarily indicative of any intent other than to comply with such a requirement. We would be reluctant to distinguish Edwards (*People v. Edwards*, 71 Cal.2d 1096, September 24, 1969, the first "garbage can" decision of the California Supreme Court) solely on the basis that the defendant in that case was permitted to place his trash barrels in his backyard for collection."

The City and County of Los Angeles have enacted, under authority of Amendments IX and X of the United States Constitution, elaborate ordinances which govern garbage hauling and which prohibit non-licensed persons, including police, from tampering with these garbage cans in the absence of a search warrant.

The Supreme Court of California has exercised its sovereign federalism power granted, *inter alia*, by *Cooper v. California*, 386 U.S. 58 (1967) to provide more stringent rights under the Fourth Amendment, and has granted to its citizens a right to privacy, under the Fourth Amendment, in the residential garbage can. Moreover, it had done so under the foregoing and following Municipal and County Ordinances, providing an independent and adequate state ground for its decision.

In the section headed "Los Angeles County Ordinances", at page 4 of this Brief, counsel have set forth, verbatim, appropriate sections of Los Angeles City and County Ordinances which govern this case.

In perusing these City and County Ordinances which are applicable to the instant case and upon which, *inter alia*, the California High Court based its ruling, it is to be noted that only *licensed* collectors may gather trash (*supra*, p. 5). No one may obtain a *license* until he has

put up a bond (*supra*, p. 6). Specific *hours* are provided for *collecting* trash (*supra*, p. 6), and for care of the trash cans (*supra*, p. 7). Further, Section 1706 (*supra*, p. 7) provides elaborate details for the requirements of placing the cans at curbside. While arrangements may be made for having the garbage collectors pick up a backyard located can, this likely would be reserved for people disenabled physically. Respondents are young and able bodies, and no need arose to circumvent the placing of the can at curbside, pursuant to statute.

Section 1707 provides *time* boundaries between which the cans must be placed at and removed from curbside. And, lastly and importantly, Section 1710 prohibits the tampering by an unauthorized *person* with the container, and inferentially its contents, for the contents may not of course be removed without tampering with the can itself.

Logically:

(1) *Persons* (Section 1710) *having no authority* may not tamper with the can;

(2) *Persons* (Section 1601) include municipalities acting obviously thru their agents, here *police*, who thereafter illegally recruit garbage haulers to *act in a police capacity;*

(3) *Police* have no license to haul waste and have put up no bond and can not qualify as garbage haulers (Sections 1611, 1612 and 1618);

(4) Police are therefore unauthorized *persons* who can not tamper with Los Angeles garbage cans through the use of garbage hauler agents.

The import of the foregoing is the following:

Respondents KRIVDA and MINOR were residents of Los Angeles at the time of their arrest. As such they were precluded from burning their trash because of the smog

and other air pollution-precipitated restrictions as codified in Los Angeles. Thus, they could not dispose of trash unless they conformed to the requirements of the ordinances and the City/County trash pick-up facilities. To take advantage of these facilities, they were required to comply with the applicable ordinances, which required *inter alia*, bringing the trash to the curbside to facilitate its pick-up. Indeed, if the trash barrels were not brought to the curbside, the trash would not be picked up. In this sense, the rules of search and seizure under the Fourth Amendment are modernly measured by the criteria of "reasonable expectation of privacy" rather than on the passé "property" or "agency" concepts, *Katz v. United States*, (1967) 389 U.S. 347.

Counsel would be remiss if they did not suggest that in reality Los Angeles had instituted a de facto "contract of adhesion" between itself and the homedwelling resident desiring to rid himself of his garbage. The resident dweller must conform to highly regulated procedures, set by code, in order to rid himself of his refuse. He is otherwise unable to part company with it. Concomitantly, the ordinances provide rigid protective regulations governing *who* may pick up the garbage and under what circumstances.

A. The Independent and Adequate State Ground.

The California Supreme Court recognized and gave credence to these City/County ordinances in the decision of this case and these ordinances provide an independent and adequate state ground to support a ruling that Los Angeles police may not make police agents of the garbage hauler, ordering or enticing the garbage hauler to violate the regulations and ordinances in order to allow a search and seizure of the garbage.

Respondents note with careful interest that petitioners contend (Page 33, Opening Brief) that the police "had apparent justification for their *belief* that an examination of respondents' trash in the well of the trash truck was not an unreasonable search."

Petitioner here apparently ascribes knowledge of *Abel v. United States,* 362 U.S. at 241, to the police. Because of this allegation of their intimate knowledge and belief, petitioners argue that the police "knowingly" and "legally" proceeded with the search. Petitioners conveniently forgot to ascribe concomitant knowledge of the foregoing *local ordinances* to the police, which ordinances specifically forbid such activity on the part of the garbage haulers and the police. These ordinances were also presumably known to the garbage haulers who themselves should have refused to violate them for the police.

The foregoing independent and quite adequate state ground precludes this Honorable Court from considering the Federal Allegation of error under the Fourth and Fourteenth Amendments of the Federal Constitution.

As this Court has said in *Johnson v. New Jersey* (1966) 384 U.S. 719, 735, 86 S.Ct. 1772, 1782:

> "The New Jersey Supreme Court invoked a state procedural rule previously applied in another confession case, as a bar to reconsideration of petitioner's coerced confession claim, even in the light of their new allegations regarding the denial of outside assistance. See New Jersey Rev. Rules 3:10, A-5 (1965 Supp.); *State v. Smith,* 43 N.J. 67, 202 A.2d 669 (1964). *This is an adequate state ground which precludes us from testing the coerced confession claim on the present review, whatever may be the significance of the state court's reliance on its*

procedural rule in federal habeas corpus proceedings. See *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822 (1963).

For further authority that precludes consideration by this Court in view of the presence of an independent, adequate state ground, see *Minnesota v. National Tea Co.,* 309 U.S. 551 (1940); *Jankovich v. Indiana Toll Road Commission,* 370 U.S. 487 (1965); *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Fox Film Corp. v. Muller,* 296 U.S. 207, 210; *Lynch v. New York ex. rel. Pierson,* 293 U.S. 52; *New York City v. Central Savings Bank,* 306 U.S. 661. See also, *Honeyman v. Hana,* 300 U.S. 14.

In *Herb v. Pitcairn, supra,* at 125-26, this Court held:

> "Our only power over state judgment is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Obviously, even though this Court could rule that there was no illegal search and seizure pursuant to the Fourth Amendment, the California Supreme Court could rely on either the concomitant Article I, Section 19 of the State Constitution, *supra, or,* as it did in deciding *People v. Krivda,* (1971) 5 Cal.3d 357, that local county and municipal ordinances provide an independent and adequate state ground. In this sense, any decision of this Honorable Court, even assuming valid jurisdiction arguendo, would be merely an advisory opinion on the Federal issue of the Fourth Amendment. As such, jurisdiction does not lie in this Honorable Court, and

Certiorari was improvidently granted. *Miller v. California*, 392 U.S. 616, 88 S.Ct. 2258 (1968).

On the other hand, if an independent and adequate state ground deprives the criminal *defendant* of rights guaranteed by the Fourth and Fourteenth Amendments, this Court can give, and has given, relief. *Henry v. Mississippi*, 379 U.S. 443 (1965). In *Henry*, this Court again clearly spoke, however, on the issue of the valid independent state ground and adequate state basis, *even though* a federal question is simultaneously decided. At 379 U.S. 443, 446, 85 S.Ct. 564, 567, the Honorable William J. Brennan stated:

> "It is of course a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even though these judgments also decide federal questions. . . ."

Respondents thus contend that the ruling of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357, 366 that:

> ". . . The provisions of these *ordinances* would appear to refute the view that the contents of one's trash barrels become public property when placed on the sidewalk for collection. . . ."

constitutes an independent and adequate state ground to support the decision of the California Supreme Court.

In passing it is significant to note that the three man dissent in *Krivda* stated, *inter alia*, at 5 Cal.3d 357, 368:

> "I do not question the proposition enunciated in *People v. Edwards, supra*, 71 Cal.2d 1096, that trash cans immediately adjacent to a home, in a place to which the general public is not invited, are within a "constitutionally protected area" (*Hoffa v. United*

States (1966) 385 U.S. 293, 301) as to which the owner may reasonably expect privacy from governmental intrusion. That expectation, however, is inextricably bound up in the physical location of the trash cans. I can not accept the proposition that either *Edwards* or the Constitution compels extension of protection to trash cans to those placed adjacent to or on a public thoroughfare, nor do I find any constitutional compulsion for the newly developed doctrine of "commingled trash." . . ."

Thus, the California Supreme Court was *unanimous* that a trash can immediately adjacent to the home should be protected, but the Court differed as to the effect of the simple fact that respondents can was placed at curbside.

Respondents, however, as covered in this Brief above, were *forced*, by local ordinances, to place their can at curbside, and logically should not be denied equal protection of the laws merely because they had to comply with local City/County ordinances to effectuate pick-up of their trash.

Thus, the distinction set forth in the three man dissent is not intellectually satisfying. It suggests an equal protection of law problem, to wit, discrimination against people in locales where the can *must* be placed at curbside to enable pick-up, as opposed to people in locales where haulers might be willing to enter, say, a garbage storage area or back porch to collect the can's contents.

The independent and adequate state ground, taken by itself, deprives this Honorable Court of jurisdiction and provides a non-federal ground to support the decision of the California Supreme Court.

B. The Permissible and Higher State Standards Under the Fourth and Fourteenth Amendments

Respondents contend that the Supreme Court of the State of California may impose more stringent search and seizure regulations upon State Courts and State law enforcement, thus providing higher protection for its citizens than required by this Honorable Court and by the Federal Constitution. It has done so in the case at bar.

Indeed, this Honorable Court has specifically enunciated that the *States and Supreme Courts of the States may in general provide stricter constitutional standards than those laid down by this Court.* Concerning the retroactivity of *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and *Escobedo v. Illinois*, (1964) 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, this Honorable Court per Chief Justice Warren stated in *Johnson v. New Jersey*, (1966) 384 U.S. 719, 733, 86 S.Ct. 1772, 1781:

> "In the light of these additional considerations, we conclude that *Escobedo* and *Miranda* should apply only to cases commenced after those decisions were announced. We recognize that certain state courts have perceived the implications of *Escobedo* and have therefore anticipated our holding in *Miranda.* Of course, *states are still entirely free to effectuate under their own law stricter standards that those we have laid down and to apply those standards in a broader range of cases than is required by this decision.*"

Similarly, in *Jenkins v. Delaware*, (1969) 395 U.S. 213, 222, 89 S.Ct. 1677, 1682, fn. 10, this Court provided, concerning applicability of *Miranda* to *retrials*:

> "... A state is free, of course, for any reason it finds persuasive, to apply *Miranda* to a *subsequent*

trial of a defendant whose original trial commenced prior to that decision. . . ."

And, for a more applicable issue, to search and seizure itself, this Court provided in *Cooper v. California,* (1967) 386 U.S. 58, 62, 17 L.Ed.2d 730, 734, 87 S.Ct. 788, 791:

> "Our holding, of course, does not affect the State's *power to impose higher standards on searches and seizures* than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own harmless-error rule to such errors of state law. . . ."

As examples, other than *Krivda*, of more stringent Fourth Amendment standards adopted by California, see also *Kaplan v. Superior Court,* (1971) 6 Cal.3d 150, 155, and *People v. Martin,* (1955) 45 Cal.2d 755. In *Kaplan* and *Martin,* the California Supreme Court held and adopted for California the rule that a criminal defendant is entitled to object to the introduction of evidence illegally seized from a third person, even though the "vicarious exclusionary rule" is not required as a matter of federal constitutional law under the prevailing federal interpretation of the Fourth Amendment. *Alderman v. United States,* (1969) 394 U.S. 165, 171-176, 22 L.Ed.2d 176, 185-188, 89 S.Ct. 961.

Moreover, as is seen by the initiative of states willing to apply the exclusionary rule long before this Court so mandated in *Mapp v. Ohio* 367 U.S. 643 (1961), the states are free to specifically provide that "illegally seized evidence is inadmissible against anyone for any purpose." *Alderman v. United States,* (1969) 394 U.S. 165, 175, 22 L.Ed.2d 176, 188, 89 S.Ct. 961.

Summarizing:

(1) Respondents thus assert that the various municipalities within, and Los Angeles County itself, have "preempted the field" by enacting local ordinances, as they may do under the Ninth and Tenth Amendments, in an area in which the Federal and State Constitutions and Federal and State Statutes have not spoken. Compare *Halpin v. Superior Court,* (1972) 6 Cal.3d 885.

(2) Respondents assert that the California Supreme Court gave credence to these independent and adequate statutes in striking down the search and seizure of California garbage cans as illegal and thus based their decision on an independent *and* adequate state ground. *People v. Krivda,* (1971) 5 Cal.3d 357, 366; see also, Article I, Section 19, California Constitution and *People v. Cahan,* (1955) 44 Cal.2d 434.

(3) Respondents assert that the California Supreme Court is free to provide more stringent search and seizure regulations as set forth in any Federal Statute or the Federal Constitution, within the meaning of *Johnson v. New Jersey, supra; Jenkins v. Delaware, supra; Cooper v. California, supra;* and *People v. Martin;* and *Kaplan v. Superior Court, supra.* This the California Supreme Court has done in its dual decisions regulating the search and seizure from garbage cans. *People v. Edwards,* (1970) 71 Cal.2d 1096; *People v. Krivda and Minor,* (1971) 5 Cal.3d 357.

Moreover, these dual decisions are independent of what any other State Supreme Court may do in reliance on its own interpretation of such constitutional search and seizure provisions as may pertain in its own state to the right of privacy in garbage cans. There may be, in those states, (a) no local municipal and county ordi-

nances in effect, or (b) Supreme Courts which may simply have chosen not to apply more stringent search and seizure regulations within their jurisdictions. *State v. Purvis*, (1968) 249 Ore. 404, 438 P.2d 1002; *Croker v. State*, 447 P.2d 122 (Wyoming, 1970).

Similarly, the California Supreme Court's feelings regarding garbage can searches are not to be regulated by what *lower* Federal Courts may feel, within their respective jurisdictions, on the issue of search and seizure of garbage cans; recognizing, of course, that the Supreme Court of California is bound by decisions of *this* Honorable Court *where jurisdiction* is proper. The Supreme Court of California has recognized this principal.[1]

Thus, reliance by petitioners on decisions of the Federal Circuit Courts of Appeals regarding garbage can searches is not commanding to the High Court of California should it wish to exact more stringent search and seizure requirements. *Cooper v. California*, 386 U.S. 58, 62. See *United States v. Dzialak*, 441 F.2d 212 (2nd Cir. 1971); *United States v. Stroble*, 431 F.2d 1273 (6th Cir. 1970); *United States v. Minker*, 312 F.2d 632 (3rd Cir. 1962); *contra*, *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957).

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[1] In *People v. Bradley* (1969) 1 Cal. 3d 80, 86, where reasonable expectation of privacy in marijuana plants in a backyard of a private home was in issue, the California Supreme Court stated:

> ". . . Furthermore, although we are bound by decisions of the United States Supreme Court interpreting the Federal Constitution (citing cases), we are not bound by the decisions of the lower Federal Courts, even on federal questions. . . ."

(4) Finally, in view of the local municipal and county ordinances regulating the collecting of garbage, respondents KRIVDA and MINOR had reasonable expectations that (a) they would be free of unreasonable governmental interference and intrusion into their garbage, (b) garbage haulers were in fact bona fide garbage haulers, not agents of the police department, (c) material deposited in their private garbage can would be dumped into a garbage truck containing a large conglomeration of garbage, indistinguishable from any other garbage, and (d) carried to a local dump where it would be burned or plowed under by bulldozer, all within the meaning and spirit of *Stoner v. California,* 376 U.S. 483 (1964), and *Chapman v. United States,* 365 U.S. 610 (1961).

Respondents had a reasonable expectation that garbage haulers would not lead police on a "tour of their garbage".

The *existing law* in Los Angeles County not only, in the minds of respondents, created a reasonable belief that only licensed garbage haulers would be contacting and handling the refuse, but that *some* existing *law forbade* police from soliciting the tampering of the trash can and its contents by enticing the garbage haulers to assume the role of police agents, the police themselves being unauthorized and unlicensed to in any way deal with matters of garbage.

VII

WHETHER THE EXCLUSIONARY RULE SHOULD OR SHOULD NOT BE APPLIED UNDER THE CIRCUMSTANCES OF THE PRESENT CASE IS NOT THE ISSUE; THE CALIFORNIA SUPREME COURT DECISION IN *PEOPLE V. CAHAN*, 44 CAL.2d 434 (1955), APPLYING THE EXCLUSIONARY RULE IN CALIFORNIA, IS A RULE OF EVIDENCE PROMULGATED BY THAT COURT FOR APPLICATION IN THE STATE COURTS OF CALIFORNIA, AND, AS SUCH, IS AN INDEPENDENT AND ADEQUATE STATE GROUND, WITHIN THE MEANING OF *COOPER V. CALIFORNIA*, 386 U.S. 58 (1967), WHICH SUPPORTS THE RULING IN THIS CASE AND WHICH DEPRIVES THIS HONORABLE COURT OF JURISDICTION. THE CHALLENGE, IF ANY, ON A FEDERAL LEVEL, SHOULD BE TO THE VIABILITY OF THE FOURTH AMENDMENT ITSELF AND TO *WOLF V. COLORADO*, 338 U.S. 25 (1949).

Respondents could not hope to reiterate or review in this brief all of the pro and con arguments, articles, cases and treatises that have discussed the exclusionary rule as applied to violations of the Fourth Amendment.

It is well, however, to recall that the adoption of the exclusionary rule was by choice of the states themselves, initially, until *Mapp v. Ohio*, 367 U.S. 643 (1961), and presumably the status quo ante would obtain should any serious encroachment upon the *Mapp* decision be decreed by this Honorable Court.

It is well established in history that special interest groups periodically renew judicial efforts to alter existing laws in order to advance their own aims. These efforts have coincided with significant changes in membership of this Honorable Court. Even the late President Franklin Delano Roosevelt was sufficiently moved to attempt to

alter the Court itself in an effort to secure more sympathetic response to the legislation of the New Deal in 1937 in his abortive and ill-timed "court packing" maneuver. The addition of four new members to this Honorable Court by President Nixon apparently portends a propitious opportunity in the eyes of petitioner to "do away" with the exclusionary rule.

Respondents suggest, however, that the petitioner is in attack on the wrong element; its attack is on the branches instead of the tree itself.

Respondents suggest that the only logical national attack must be in thrust at the continuing viability of the Fourth Amendment itself via Constitutional Amendment, if at all, or to reconsideration of *Wolf v. Colorado*, 338 U.S. 25 (1949). This of course has been accomplished in the past as may readily be seen in consideration of Amendments XVIII and XXI, establishing and repealing National Prohibition.

An attack at the lower level—the level of the exclusionary rule itself—truly misses the fundamental problem.

Petitioner would do well to review the entire language of the opinion of the Honorable Roger J. Traynor, Chief Justice of the Supreme Court of California, who remains in memory as one of California's most revered and scholarly jurists, which he wrote in *People v. Cahan*, 44 Cal.2d 434 (1955), and which, in pertinent parts, is set forth in *haec verba*, in the appendix, at page 1b.

A. The Decision of the California Supreme Court in *People v. Krivda*, 5 Cal.3d 357 (1971) can be supported on at least two independent and adequate state Grounds.

1. Article I, Section 19 of the Constitution of California and the decision of California's Supreme Court in *People v. Cahan*, 44 Cal.2d 434 (1955).

In *Cahan, supra,* Justice Traynor first sets forth some of the oft-quoted reasons for non-application and elimination of the exclusionary rule. Paraphrasing:

a. A criminal trial is a search for truth, and the exclusionary rule deprives the trier of fact of perhaps the most probative evidence available. The evidence secured illegally is just as reliable as that lawfully obtained (44 C.2d at 442-443).

b. The suppression of the evidence neither protects the defendant from the illegal search and seizure, for that has already occurred, nor does it chastise the errant police (44 C.2d at 443).

c. Civil cases allow the use of illegally-seized evidence (44 C.2d at 443).

d. There is no convincing evidence that the exclusionary rule actually tends to prevent unreasonable searches and seizures (44 C.2d at 444).

After careful analysis, however, Justice Traynor, writing for the 4-3 majority, concluded that:

> "... evidence obtained in violation of the constitutional guarantees is inadmissible ... because other remedies have completely failed to secure compliance with the constitutional provisions of the part of police officers with the attendant result that the Courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers. ..." (44 C.2d at 445)

Significantly, Justice Traynor went on to state:

> "... If the unconstitutional guarantees against unreasonable searches and seizures are to have significance, they must be enforced, and if courts are to discharge their duty to support the state and

federal Constitutions, they must be willing to aid in their enforcement. If those guarantees were being effectively enforced by *other* means than excluding evidence obtained by their violation, different problems would be presented.... Experience has demonstrated, however, that neither administrative, criminal, nor civil remedies are effective in suppressing lawless searches and seizures ..." (44 C.2d 447)

2. Local Los Angeles County/Municipal Ordinances which couple with the Ninth, Tenth and Fourteenth Amendments to the United States Constitution to provide a prohibition of unauthorized tampering with garbage cans.

B. An attack on the exclusionary rule goes to the retention of the Fourth Amendment and the Rationale of *Wolf v. Colorado*, 338 U.S. 25 (1949).

The late Justice Murphy of this Honorable Court, dissenting in *Wolf v. Colorado*, warned that:

> "Alternatives (to the exclusionary rule) are deceptive. Their statement conveys the impression that one possibility is as effective as the next. For there is but one alternative to the rule of exclusion. That is no sanction at all...." (*Wolf v. Colorado*, 338 U.S. 25, 41 (1949).

The Honorable Chief Justice Warren Burger of this Honorable Court, in dissent in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 420 (1971), recognized the unfeasibility of abandonment of the suppression doctrine until some meaningful alternative can be developed.

Respondents suggest that past experience and thoughtful contemplation of the possible alternatives lead to the conclusion that the exclusionary rule is based on sound and mandatory grounds.

Some may suggest that the aggrieved defendant may pursue a Civil Rights suit under 42 U.S.C. 1983, but such an action has severe pragmatic problems. Among them are the inherent difficulties in pursuing such litigation from a prison, if the aggrieved victim is placed in custody for a significant period, and the dubious substitution and equation of monetary damages with a conviction that might not have occurred had the defendant been accorded his Fourth Amendment rights *ab initio*. Surely, it would be a rare jury who would award substantial damages to a civil rights plaintiff who had been shown, when a criminal defendant himself, to be a law breaker, successfully prosecuted by the very evidence illegally taken from him.

In the case where an illegally planned seizure turns up *no* incriminating evidence, would police officers likely inform him of the civil rights violation they have perpetrated so the aggrieved may be compensated? The question itself is almost ridiculous and the answer self-suggestive.

It must be recognized that illegal searches and seizures do not carry the emotional appeal to their error that violations of Freedom of Speech, Press and Religion command; they lack the obvious brutality of coerced confessions and "third degrees", and do not strike such a convincing blow at the very basis of our civil liberties. As such, their violations tend to go unnoticed and ignored.

Respondents suggest that pragmatically the alternatives are unworkable. The rule must be kept intact. The alterations, if any, must come via repeal of the Fourth Amendment, or reevaluation of *Wolf v. Colorado*, 338 U.S. 25 (1947).

Over thirty years ago, New York Senator Robert F. Wagner spoke with sagacity on the real issue of whether

the Fourth Amendment itself should be repealed instead of directing attack toward the much cussed and discussed exclusionary rule:

> "Finally, I have no fear that the exclusionary rule will handicap the detection or prosecution of crime. All the arguments that have been made on that score seem to me properly directed not against the exclusionary rule but against the substantive guarantee itself. The exclusion of the evidence is the only sanction which makes the rule effective. It is the rule, not the sanction, which imposes limits on the operation of the police. If the rule is obeyed as it should be, and as we declare it should be, there will be no illegally obtained evidence to be excluded by the operation of the sanction.
>
> "It seems to me inconsistent to challenge the exclusionary rule on the ground that it will hamper the police, while making no challenge to the fundamental rules to which the police are required to conform. If those rules, defining the scope of the search which may be made without a warrant and the scope of a search under a warrant are sound, there is no reason why they should be violated or why a prosecuting attorney should seek to avail himself of the fruits of their violation. If those fundamental rules are open to challenge . . . , the burden is on those who challenge them to specify the modifications they deem to be desirable. I think that is a far better course than to object to the inclusion in this amendment of the one sanction which will give the constitutional provision, however it is defined, genuine meaning." (Senator Robert F. Wagner speaking before the New York Constitutional Convention of 1938. Record of the New York State Constitutional Convention 559-560, reprinted in Allen, "The Wolf Case", 45 Ill. L. Review, 1, 19 as cited in 44 C.2d at 450.)

The changes, if any, must come at the Constitutional Amendment level.

It is interesting to note that even among the Briefs filed by California and *Amicus Curiae* in this case, there is confusion as to the reasons for abandonment of the rule. California suggests that knowledge possessed by officers at the time of seizure of the garbage led them to believe that they were within the law "to seize abandoned property" under *Abel v. United States*, 362 U.S. at 241 (Page 33, Opening Brief, California). Actually, the existing local law in Los Angeles County *forbade* such garbage can tampering, thus clearly indicating that the police were incapable of determining what the "law" was, or sere simply wrong, and bespeaking the desirability of imposing a disinterested magistrate between the people and the police. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); they clearly did not "know" that the "law" was.

The Brief of the Americans For Effective Law Enforcement, Inc., filed Amicus Curiae, suggests that the police are becoming so educated and are behaving so well that the exclusionary rule is no longer necessary (Pages 11-19, inclusive). In order to create emotional appeal, they suggest the police were "correct" in 84% of litigated search and seizure cases, and in cases where they were "wrong", the rule itself was unsound because particularly despicable defendants thereby escaped the full thrust of the law. The recent and exhaustive decision of this Honorable Court in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), is particularly offensive to this group (Page A1, A2, Appendix), but as Justice Potter Stewart has more calmly and neutrally observed:

> "We are called upon in this case to decide issues under the Fourth and Fourteenth Amendments arising in the context of a state criminal trial for the

commission of a particularly brutal murder. As in every case, our single duty is to determine the issues presented in accord with the Constitution and the law." (91 S.Ct. 2022, 2027).

It is this more serene and deliberate judicial evaluation which petitioners seek to do away with, and which this Honorable Court must again preserve. On the one hand, police spokesmen contend they are quite capable of personally deciding when to search and seize, and on the other hand the facts belie this contention and strongly suggest the need for the continuing vitality of the interposed magistrate. California fails to even admit the presence of the local ordinances in its Opening Brief; it does suggest the "uncertainty confronting the police" is manifested by the split decision of the California Supreme Court in 5 Cal.3d 357 (Pages 33-34, Brief, California). Respondents echo this "uncertainty" and suggest that this alone bespeaks for the continuation of the judicial scrutiny and exclusionary rule for violations. It seems clear that what is not totally lucid to well-trained judges can not be that evident to the biased police in the field making decisions whether to search or not, and this fact alone cries out for maintenance of the rule.

The State of Illinois, filing a brief Amicus Curiae, in urging rejection of the exclusionary rule, admits that many of its police lie on the witness stand in order to successfully convince the magistrate that their search and seizure tactics were not in violation of the Fourth Amendment (Page 6, Brief, Illinois, *Amicus Curiae*). While a more fundamental suggestion might be for Illinois police to stop lying and recognize the law as determined by a neutral magistrate rather than themselves, it is again suggested that the only meaningful changes must come via the constitutional amendment route.

Petitioners seem to suggest the desirability of a return to the status created by the period following this Honorable Court's decision in *Wolf v. Colorado*, 338 U.S. 25 (1949) and before *Mapp v. Ohio*, 367 U.S. 643 (1961). The suggestion would seem to create a situation that may be analogized to what would prevail following ruling of this Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) by allowing any state to thereafter nonetheless try defendant for felonies without lawyers; to allow prosecutors to comment on the fact that a defendant did not take the witness stand even after *Griffin v. California*, 380 U.S. 609 (1965), and *Chapman v California*, 386 U.S. 18 (1967) or to allow trial without jury in a state criminal prosecution after *Duncan v. Louisiana*, 391 U.S. 145 (1968). Without the exclusionary rule to back up the mandates of the Fourth Amendment, it is difficult to suggest a rationale for the retention of the Fourth Amendment itself insofar as the states are concerned. Because the bulk of the nation's criminal prosecutions are handled by the state courts, it seems incongrous to have exclusion of illegally seized evidence in the federal court system but permit it in the state court system. Either *Wolf, supra*, or the Fourth Amendment itself should be reevaluated.

Respondents suggest that this Honorable Court in 1914 first gave consideration to the wisdom of excluding evidence obtained by illegal search and seizures. *Weeks v. United States*, 232 U.S. 383 (1914). Some 60 years of steady judicial consideration have elapsed in a move toward the generation of *Wolf v. Colorado*, 338 U.S. 25 (1949) and *Mapp v. Ohio*, 367 U.S. 643 (1961). Last year this Court produced an exhaustive Fourth Amendment analysis in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). In the term immediately concluded, a unanimous Court struck down illegal search and seizure via domestic

wire taps. *United States v. United States District Court For the Eastern District of Michigan, Southern Division, et. al.*, ___U.S.___ (1972), 92 S.Ct. 2125. Nothing in that unanimous decision suggests the lack of feasibility of the exclusionary rule.

Respondents suggest that the judicial thinking of such distinguished Courts, favored with Louis Dembitz Brandeis, Benjamin N. Cardozo, Harlan F. Stone, Charles Evans Hughes, Felix Frankfurter and Earl Warren, to name but a half-dozen Justices in that sixty-year period, should not be decreed fallacious in their reasoning and consigned to the pages of history reserved for less august bodies by emotional special interest groups offering non-defined placebos. Today, as in *Wolf v. Colorado*, the alternatives are deceptive. 338 U.S. 25, 41 (1949). The logical attack, if any at all, is to the Fourth Amendment itself. The exclusionary rule must remain.

Inter alia, California suggests that:

> "... An elaborate and intricate system of rules can do little but confuse an already perplexed police officer...." (Brief, California, Page 51).

Petitioners and their *amicus curiae* fail to recognize the great simplification wrought in the area of search and seizure by this Honorable Court's decision in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), 91 S.Ct. 2022, 2047. Therein this Court promulgated a rule and a principle which seemingly should be understandable to judge and policeman alike:

> "... We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily under-

stood by courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police, and a principle that preserves and protects the guarantees of the Fourth Amendment. . . ."

It would seem, then, that the problems suggested by California (Pages 48 thru 53, Opening Brief), i.e., that police have difficulty deciding *when* they may search and seize, are greatly answered and solved.

It would further seem that the statistics of the Americans for Effective Law Enforcement presented in their brief, at pages 11 thru 19, inclusive, i.e., that the police are correct in 84% of the cases, can now be even higher because of the simplified rule of *Coolidge*.

In short, the police, previously finding uncertainty in their decision to search, now have a brighter guiding beacon; erudite police can increase their statistical average, *and* the citizen is still protected.

California's brief truly "flies in the face" of this Honorable Court's decision in *Coolidge, supra*. California embraces the old New Hampshire rule of letting the police and prosecutors decide what is reasonable.

Petitioner suggests the following absurdities and contra-*Coolidge* rationales:

(1) ". . . Therefore, when it appears to the *police officer* (emphasis supplied) that it is sufficiently probable that the action he intends to take does not violate Fourth Amendment rights, the exclusionary rule should not be applied. . . ." (Pet. Brief, Page 51)

(2) ". . . In applying this basic knowledge to a determination of probable cause, the *police officer* (emphasis supplied) must determine whether there is more evidence for than against, supported by

evidence which inclines the mind to believe but which leaves some room for doubt. . . ." (Pet. Brief, Page 51)

Until reading petitioner's brief, this counsel assumed that only a *judge* determined probable cause, not a policeman.

The late Justice Robert Jackson was quite clear on this point:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant, would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers . . . when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent . . ." *Johnson v. United States,* 333 U.S. 10, 13-14; cited with continuing approval, *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed.2d 564, 573, 91 S.Ct. 2022.

As this Honorable Court said in *Byars v. United States,* 273 U.S. 28, 33-34, 47 S.Ct. 248, 250, 71 L.Ed. 520 (127):

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of searches and

seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right." Cited with approval in *Corngold v. United States*, 367 F.2d 1 (9th Circuit 1966).

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Respondents suggest that this Court might well, in its decision in this case, promulgate alternatives to the exclusionary rule to be applied concomitantly with and in addition to the exclusionary rule. If these alternate sanctions appear workable, it may *thereafter* be possible to retreat from the exclusionary rule. It would then be possible to ascertain whether petitioner's asserted contentions prove feasible without withdrawing the protection of the rule. Contemporaneously, legislation could be initiated to Amend the Constitution itself if study and scholarship reveals the judiciousness of so

doing. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (dissent of Mr. Chief Justice Burger). Page 40, Brief, California. Oakes, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. (1970) at page 753.

If petitioners feel that other alternatives to the exclusionary rule are workable, let them be tested *along with* the exclusionary rule, not without. Federal funding could create a National Police and Law Enforcement Academy to train police leaders in Search and Seizure. Were this undertaken, accomplished and studied to see if the results showed a move toward a significant resolution of the problem, then, *thereafter* appropriate curtailment of the exclusionary rule might be considered and undertaken.

When "some meaningful alternative" is developed, consideration may be given to abandonment of the exclusionary rule. 403 U.S. 388, 420 (1971).

Further, and in passing, it would appear that any abandonment of the exclusionary rule would be the creation of an ex post facto law with respect to respondents, and thus be not applicable to them.

VIII.

BY WAY OF SPECIFIC OVERT RULING, THE CALIFORNIA SUPREME COURT BASED BOTH OF ITS DECISIONS IN *PEOPLE V. EDWARDS*, 71 Cal. 2d 1096 (1969) AND *PEOPLE V. KRIVDA*, 5 Cal. 3rd 357 (1971), SUPPRESSING EVIDENCE SEIZED IN THE DOMESTIC GARBAGE CAN, ON ARTICLE I, SECTION 19 OF THE CALIFORNIA CONSTITUTION AND THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; WHERE THE JUDGMENT OF A STATE COURT RESTS UPON TWO GROUNDS, ONE OF WHICH IS FEDERAL AND THE OTHER NON-FEDERAL IN CHARACTER, THE JURISDICTION OF THIS HONORABLE COURT FAILS IF THE NON-FEDERAL GROUND IS INDEPENDENT OF THE FEDERAL GROUND AND ADEQUATE TO SUPPORT THE JUDGMENT.

While respondents have elsewhere discussed the independent, adequate state basis for the judgment it is here desirable to specifically point out that the dual garbage can decisions of the California Supreme Court are based on the State Constitution in part; that is, it is of salient and significant importance to realize that the California Supreme Court in *People v. Edwards*, 71 Cal. 2d 1096, 1104-1105 (1969) overtly based its decision that the garbage can was illegally seized and searched upon *BOTH* the Fourth Amendment to the United States Constitution *AND* Article I, Section 19 of the California Constitution.

Our High Court said, per the Honorable Louis Burke:

"It is also clear that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. The United States Supreme Court repeatedly has emphasized that the mandate

of the [Fourth] Amendment requires adherence to judicial processes [citation], and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . —subject only to a few specifically established and well-delineated exceptions' (*Katz v. United States, supra,* 389 U.S. 347, 357 [19 L.Ed.2d 576, 585, 88 S.Ct. 507].) In the instant case it does not appear that any of the exceptions apply to the search of the trash can. Accordingly, that search was unlawful under the Fourth Amendment of the federal Constitution. It similarly violated article I, section 19, of the California Constitution. The trial court thus erred in admitting the evidence found in the trash can." *People v. Edwards,* 71 Cal.2d 1096, 1104-1105 (1969).

Importantly, then, the California High Court reaffirmed *Edwards, supra,* in *People v. Krivda,* the case sub judice, 5 Cal. 3rd 357 (1971), specifically citing pages 1104-1105 of that opinion. It is moreover significant that the Honorable Louis Burke wrote both opinions, assuring a continuity of reasoning.

At Page 364 of Krivda, *supra,* the Court said:

A number of cases in upholding searches in open fields or grounds around a house have stated their conclusions in terms of whether the place was a "constitutionally protected area," (see, e.g., cases cited in *People v. Edwards, supra,* 71 Cal.2d 1096). That phrase, however, does not afford a solution to every case involving a claim of an illegal search and seizure (see *Katz v. United States,* 389 U.S. 347, 350-352 [19 L.Ed.2d 576, 581-582, 88 S.Ct. 507]), and we have held that an appropriate test is whether the person has exhibited a reasonable expectation of privacy, and, if so, whether that expectation has

been violated by unreasonable governmental intrusion (*People v. Bradley*, 1 Cal.3d 80, 84 [81 Cal. Rptr. 457, 460 P.2d 129]; *People v. Edwards, supra*, 71 Cal.2d 1096, 1104-1105).

The People note that *Edwards* and *Bradley* were decided subsequent to the events which led to defendants' arrest herein and urge that the principles announced in those decisions should be given only prospective effect. However, the "reasonable expectation of privacy" test adopted in *Edwards* and reaffirmed in *Bradley* represented no new constitutional principle which might call into play the various criteria (see, e.g., *Edwards, supra*, at pp. 1107-1108) used for resolving retroactivity problems. Instead, that test was put forth at least as early as *Katz v. United States, supra*, 389 U.S. 347, 353 [19 L.Ed.2d 576, 583], wherein the court held that "The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment " and that in the absence of prior judicial authorization the search and seizure were unreasonable. (See also *People v. Edwards, supra*, 71 Cal.2d 1096, 1103-1104; *People v. Terry*, 70 Cal.2d 410, 427 [77 Cal. Rptr. 460, 454 P.2d 36].) (6) We conclude that the principles of *Edwards* and *Bradley*, to the extent they depend upon like principles in *Katz v. United States, supra*, may properly be applied to test the validity of the search and seizure at issue herein.

Similarly, at Page 367, the California Court said:

"It is also clear, as in *Edwards*, that defendants' reasonable expectation of privacy was violated by unreasonable governmental intrusion. (See *People v.*

Edwards, supra, 71 Cal.2d 1096, 1104-1105.) We should hesitate to encourage a practice whereby our citizens' trash cans could be made the subject of police inspection without the protection of applying for and securing a search warrant."

It is thus clear that both *Edwards, supra,* and *Krivda, supra,* now before this Honorable Court, were bottomed upon Article 1, Section 19, of the California Constitution.

As such, this Honorable Court is deprived of jurisdiction to decide any alleged concomitant Federal question. *Fox Film Corporation v. Muller,* 296 U.S. 207, 210 (1935).

IX.

OF PRAGMATISM AND PRACTICALITY.

In its petition for Certiorari (pages 9-10), California asserts that garbage can searching is a vital and important investigative method in combatting clandestine crime. While not pursuing this fallacy in its opening brief, counsel for respondents would be remiss if reflection were not accorded this specious contention.

We must recall that here we are not litigating the constitutionality of the search and seizure of the garbage cans based on a search warrant issued upon probable cause; we are litigating the constitutionality of the indiscriminate, random, chaotic search of garbage cans. No one is seriously denying the police the right to search any can, either independently or as an adjunct to the search of a private home with a search warrant. It is, however, ludicrous to suggest, as does petitioner, that random search of the millions of American garbage cans by police will be a fruitful combative tool to be used

against clandestine criminal activity for the elementary reason that the garbage can/policeman ratio must be astronomical. It is such an elevated ratio that any thinking person would realize its abject futility upon a moment's serious reflective consideration. Moreover, it suggests itself as a frightening misuse of police manpower, which of necessity must and should be devoted to more concrete and burgeoning detective endeavors. The thought of teams of police grovelling in the nation's garbage cans on the nebulous hope that they might find a scrap of incriminating evidence upon which to base some yet unknown charges against unknown persons stretches the logical mind to its breaking point.

Clearly, if probable cause is available to warrant the search of a given specific garbage can, quite the opposite appertains, but then there is no constitutionally sound reason to circumvent the preferred search warrant. *Coolidge v. New Hampshire* (1971) 403 U.S. 443.

Further, it is suggested that the dearth of "garbage can search" decisions in all of the Federal and State Courts in the last three decades presages a total lack of practicality of this type of surreptitious investigative tool. Apparently one can enumerate all of the reported decisions dealing with the subject on the fingers of both hands, hardly suggesting its widespread interest.

Respondents suggest to this Court that among the reasons for expecting privacy or freedom from governmental search in the nation's garbage cans is surely the lack of police manpower to meaningfully implement such a scheme. Even granting a concrete premonition in the mind of a given resident of Waterloo, Iowa, Great Falls, Montana, or Santa Fe, New Mexico that a team of police would, somewhere in those towns, strike on a given day at a given garbage can, the odds at losing in

"Garbage Can Roulette" would be so minuscule as to suggest carefree abandonment of concern. Not only do respondents assert that virtually 100% of the housewives and husbands of this nation blissfully and reasonably believe that the fate of their garbage will be a routine and inconsequential sojourn from garbage can to city dump, respondents also assert that any other belief would be mathematically ridiculous. In this sense, the decision of this Court on reasonable expectation of privacy in garbage cans can be supported on the scientific and mathematical theory of probability; that scientific conclusion can only be that, statistically, each and every one of us can leave for work reasonably knowing that "Garbage Can Roulette" will not decree us a loser to the randomly dispersed police officers who, that day, have fallen heir to the refuse detail.

Statistics aside, these counsel, following inception of affiliation with this case, have with interest interrogated people ranging from airline stewardesses and housewives to both active and retired police; none of those persons have suggested they believe police would be grovelling like hungry animals in their garbage cans.

With full and humble respect to the members of this Honorable Court, respondents suggest a representative statistical sample might be gleaned from the nine spouses of this Court as to what reasonable expectations they may entertain as to the reasonable fate of the week's garbage when it leaves the confines of their residence. Respondents would express surprise if any votes are returned predicting police intervention and scrutiny between kitchen and garbage dump.

Respondents suggest that what waddles like a duck, looks like a duck and quacks like a duck, is usually a duck; what presents itself in the neighborhood appearing

to be a harried and hard-pressed-for-time garbage hauler should be and usually is indeed a hard-working garbage hauler, and not an undercover police agent.

Respondents suggest that it is the zenith of incredulity to believe that a given garbage hauler is a police agent and the "entrusting" to him of the week's garbage is fraught with "misplaced trust". *United States v. White*, 401 U.S. 745, 752 (1971); *On Lee v. United States*, 343 U.S. 747; *Massiah v. United States*, 377 U.S. 201 (1964). Pages 29-30, Petitioner's Opening Brief.

Respondents suggest that the citizens of this nation do not share the "gestapo" mind of petitioner, and, moreover, the vibrant and freedom-loving United States of America is too great a country to need or to desire to require its citizens to be faced with uncertainty of identity of local garbage haulers. To allow warrantless garbage can searches to be a mandate from this Honorable Court, and one that we are to live with in fear henceforth, bespeaks of a 1939 environment on the European continent which respondents believe to have been laid to rest in 1945.

In further assertion in the area of pragmatism, Respondents contend and argue that potentially dangerous avenues of fraud are opened upon the citizens of America, should California prevail before this Court. Apparently California would have this Court sanction the following hypothetical but exemplary procedure, should any unscrupulous person desire to "eliminate" his neighbor or any other citizen from society:

(1) The person initiating the "elimination" process deposits marijuana in the trash can of the party sought to be eliminated;

(2) He then places an anonymous phone call to police specifying that marijuana may be found in the trash can at 123 Mainstreet, Your Town, U.S.A.;

(3) Police immediately converge and locate marijuana in the trash can of the homeowner;

(4) Unless the homeowner can convince the trier of fact that it is not his, he is the new possessor of a felony record. The establishing of innocence is fraught with uncertainty.

Respondents suggest that the implantation of contraband in trash cans is far easier and more prone to abuse than implantation in homes, cars, or on the person, and this Court should not pave the way for such easily enacted and difficult to disprove techniques of fraud.

CONCLUSION

For the foregoing reasons, respondents, JUDITH H. KRIVDA and RODGER T. MINOR, submit that the warrantless search and seizure of their domestic trash can and its contents violated their reasonable expectation of privacy and was therefore in violation of the FOURTH and FOURTEENTH Amendments to the United States Constitution, and the NINTH and TENTH Amendments to the United States Constitution, as coupled with the Los Angeles County/Municipal Ordinances.

Further, the decisions of the California Supreme Court in cases of *People v. Edwards*, 71 Cal. 2d 1096 (1970) and *People v. Krivda*, 5 Cal. 3d 357 (1971) are based upon and supported by independent and adequate state grounds. These state grounds are Article I, Section 19 of the State Constitution, *People v. Cahan*, 44 C.2d 434 (1955), and the local county/municipal garbage can ordinances.

Lastly, it is clear that the repeal of the exclusionary rule must only come via repeal of the FOURTH Amendment and reversal of *Wolf v. Colorado*, 338 U.S. 25 (1949); when the latter remain viable, there is no other realistic modicum of enforcement, save the exclusionary rule.

Respondents urge that the judgment of the California Supreme Court be affirmed and Certiorari dismissed as improvidently granted.

Respectfully submitted,

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APPENDIX A

PROBABILITY OF SUCCESSFUL LOCATION OF CONTRABAND IN TRASH CANS

NOTE 1

For illustrative purposes, if a small community is composed of ten families and one policeman who could search but one can due to the press of other duties on a given garbage pick-up day, the following appertains:

(1) If *all* families dispose of marijuana in the trash can, the probability of any family getting caught is one-tenth; on the other hand, the probability of the policeman being successful is 1/1, i.e., 100% because any can he searches contains marijuana.

(2) If one of ten cans contains marijuana, the probability of the policeman locating the can containing marijuana is one-tenth. The overall probability of the community of families getting caught is one-tenth. The following analysis utilizes exponential notation, i.e.,

$10^1 = 10$, $10^2 = (10)(10) = 100$, $10^3 = 1{,}000$
$10^6 = 1{,}000{,}000$ and so forth.

For a community such as Los Angeles containing roughly three million persons and having a police force of 7,000, similar analysis appertains:

(1) If the average family has four people, there are

$$\frac{3(10^6)}{4} = .75(10^6) \text{ families;}$$

(2) If each family has at least one can (and many have multiple cans, of course), then there are roughly (10^6) garbage cans in Los Angeles.

(3) If but 100 policemen can be devoted to the garbage can search detail, the probability of any one of the 10^6 families getting caught, assuming all families dispose of marijuana in the garbage can is

$$\frac{10^2}{10^6} = \frac{1}{10^4}$$

or one in 10,000, while the probability of the police being successful remains 1/1, or perfect, as *all* cans contain marijuana. On the other hand, if but 1/100 of the cans contain contraband, the overall probability of the marijuana disposing families getting caught is 1/100 assuming but one possible police contact per disposal day in the community. Doubling the police *or* the cans contacted places 2/100 or 1/50 as the probability of someone getting caught. Going to the extreme of increasing the police 100-fold, or the can contacts 100-fold, again restores the probability of someone getting caught to 100%, or perfect chances of a marijuana disposing family getting caught. There is, however, no certainty of anyone getting caught. It is to be emphasized that the *probability*, not the *certainty*, rises to 100%. This means that when flipping a coin, the probability of obtaining a head in a single toss is 1/2 or 50%; it does not mean that if a tail is attained the first time, then there is a *certainty* of a head occurring on the second toss in order to meet, in two tosses, the mathematical *probability* of 50%. In other words, probabilities are based on an immense number–theoretically an infinite number–of tosses. Indeed, one might flip a coin ten consecutive times and obtain ten consecutive tails; on the eleventh

toss, the probability of obtaining a head is still 1/2 or 50%. It does mean, however, that in a huge number of attempts, say $(10)^6$, one would probably obtain 5 (10^5) tails and a like number of heads. *Probability*, then, must clearly be distinguished from *certainty*.

If one assumes, arguendo, based on the above analysis, that there is a probability that 1/100 garbage cans contain marijuana or other contraband, it is apparent that this ratio alone is not promising for portending success in locating the magic can. The *certainty*, of course, is never present unless all cans are searched.

Proceeding, however, from this assumed probability of (1/100), consider the search of the garbage can sitting undefended at curbside:

(1) Assume that of the cans commenced search, one of two present such offensive odors that even the most stalwart detective gives up; i.e., the probability of completion is (1/2);

(2) Assume that of each can commenced search, the homeowner notices the act of search and halts the procedure in 1/2 times;

(3) Assume that of those totally searched, the item of "contraband" is only "recognized" and hence seized in only one of five cans, i.e., the probability of seizure is (1/5);

Thus, with the foregoing simple figures, the probable likelihood of success is (1/100) (1/2) (1/2) (1/5)=1/2000, hardly bespeaking for optimistic "garbage can roulette."

NOTE 2

Thus, we might assume that the chances of convincing garbage haulers to violate the law and permit police rummaging and garbage tampering might be confined to one of four haulers; this boosts the inherent probability of privacy to one in 8,000. Further, of those haulers cooperating, assume only in one of two occasions were the police able to time their contact sufficiently opportunistically to intercept before the garbage was elevated from the "bin" into the truck. The odds then rise to one in 16,000. Obviously, police could not perpetually be successful in slowing down the process of garbage pickup to effect their "bin" examination, for the harried haulers eventually would likely opt to complete their rounds rather than participating in playing detective.

While counsel quickly admits the lack of basis for the numerical values, it is readily seen that the power in the analysis comes not so much from the accuracy of the individual numbers, but from the shockingly large number resulting from the *product* of the individual probabilities; several of them could be adjusted more favorably to the police and yet the *product* remains extremely large. See, *People v. Collins*, 68 Cal. 2d 319, (1968) for an excellent example of this technique.

APPENDIX B

PARTIAL OPINION
PEOPLE v. CAHAN, 44 Cal. 2d 434 (1955)

"Meanwhile, pursuant to the suggestion of the United States Supreme Court, we have reconsidered the rule we have heretofore followed that the unconstitutional methods by which evidence is obtained does not affect its admissibility and have carefully weighed the various arguments that have been advanced for and against that rule. It bears emphasis that in the absence of a holding by the United States Supreme Court that the due process clause requires exclusion of unconstitutionally obtained evidence, whatever rule we adopt, whether it excludes or admits the evidence, will be a judicially declared rule of evidence. (See *MacNabb v. United States*, 318 U.S. 332, 341 [63 S.Ct. 608, 87 L. Ed. 819]; *On Lee v. United States*, 343 U.S. 747, 756 [72 S.Ct. 967, 96 L. Ed. 1270].)

The rule admitting the evidence has been strongly supported by both scholars and judges.* (Footnote omitted). Their arguments may be briefly summarized as follows:

The rules of evidence are designed to enable courts to reach the truth and, in criminal cases, to secure a fair trial to those accused of crime. Evidence obtained by an illegal search and seizure is ordinarily just as true and reliable as evidence lawfully obtained. The court needs all reliable evidence material to the issue before it, the guilt or innocence of the accused, and how such evidence is obtained is immaterial to that issue. It should not be excluded unless strong considerations of public policy demand it. There are no such considerations.

Exclusion of the evidence cannot be justified as affording protection or recompense to the defendant or punishment to the officers for the illegal search and seizure. It does not protect the defendant from the search and seizure, since that illegal act has already occurred. If he is innocent or if there is ample evidence to convict him without the illegally obtained evidence, exclusion of the evidence gives him no remedy at all. Thus the only defendants who benefit by the exclusionary rule are those criminals who could not be convicted without the illegally obtained evidence. Allowing such criminals to escape punishment is not appropriate recompense for the invasion of their constitutional rights; it does not punish the officers who violated the constitutional provisions; and it fails to protect society from known criminals who should not be left at large. For his crime the defendant should be punished. For his violation of the constitutional provisions the offending officer should be punished. As the exclusionary rule operates, however, the defendant's crime and the officer's flouting of constitutional guarantees both go unpunished. 'The criminal is to go free because the constable has blundered' (Cardozo, J., in *People v. Defore, supra*, 242 N.Y. 13, 21), and 'Society is deprived of its remedy against one lawbreaker, because he has been pursued by another' (Jackson, J., in *Irvine v. California, supra*, 347 U.S. 128, at 136; see also 8 Wigmore on Evidence [3d ed.] § 2184, p. 40.)

Opponents of the exclusionary rule also point out that it is inconsistent with the rule allowing private litigants to use illegally obtained evidence (see *Munson v. Munson*, 27 Cal. 2d 659, 664 [166 P.2d 268]; *Oil Workers Int'l Union v. Superior Court*, 103 Cal. App. 2d 512, 579-580 [230 P.2d 71]; *cf., Herrscher v. State Bar*, 4 Cal. 2d 399,

412 [49 P.2d 832]), and that as applied in the federal courts, it is capricious in its operation, either going too far or not far enough. '[S]o many exceptions to [the exclusionary] rule have been granted the judicial blessing as largely to destroy any value it might otherwise have had. Instead of adding to the security of legitimate individual rights, its principal contribution has been to add further technicalities to the law of criminal procedure. A district attorney who is willing to pay the price may easily circumvent its limitations. And the price to be paid is by no means high.' (Grant, *Circumventing the Fourth Amendment*, 14 So. Cal. L. Rev. 359.) Thus, the rule as applied in the federal courts has been held to protect only defendants whose own rights have been invaded by federal officers. If the illegal search and seizure have been conducted by a state officer or a private person not acting in cooperation with federal officers, or if the property seized is not defendant's the rule does not apply. (*Burdeau v. McDowell*, 256 U.S. 465 [41 S.Ct. 574, 65 L.Ed. 1048, 13 A.L.R. 1159]; *Lustig v. United States*, 338 U.S. 74, 78-79 [69 S.Ct. 1372, 93 L.Ed. 1819]; *Connolly v. Medalie*, 58 F.2d 629; *Kelley v. United States*, 61 F.2d 843; *Parker v. United States*, 183 F.2d 268; *Steeber v. United States*, 198 F.2d 615; *United States v. Stirsman*, 212 F.2d 900; *cf. Gambino v. United States*, 274 U.S. 310 [48 S.Ct. 137, 72 L.Ed. 293, 52 A.L.R. 1381].)*"

*Since it was determined in *Wolf v. Colorado, supra*, 338 U.S. 25, that the Fourth Amendment prohibitions are applicable to state officers, it may be that evidence secured illegally by state officers is no longer admissible in federal courts. (See Murphy, J., concurring in *Lustig v. United States*, 338 U.S. 74, at p. 80 [698 S.Ct. 1372, 93 L.Ed. 1819]. 'In my opinion the important consideration is the presence of an illegal search. Whether state or federal officers did the searching is of no consequence to the

defendant and it should make no difference to us.' See also *McDonald v. United States*, 335 U.S. 451, 456 [69 S.Ct. 191, 93 L.Ed. 153]; *United States v. Jeffers*, 342 U.S. 48 [72 S.Ct. 93, 96 L.Ed. 59]; Allen, *The Wolf Case*, 45 Ill.L.Rev. 1, 24.)

A distinction with respect to evidence illegally obtained by private individuals may be justified by the fact that the constitutional provisions only proscribe governmental action. 'It is one thing for the government to take advantage of information which one wrongdoer reveals of another, or the revelations which ensue when thieves fall out, and quite another thing for the government to condone or encourage a violation of the law by officers sworn to observe and enforce the law. If peace officers are rewarded for breaching the peace, what more potent influence could induce people generally to hold the law in contempt and to break through legal barriers which stand across the path of their desires!' (*State v. Owens*, 302 Mo. 348, 377 [259 S.W. 100, 32 A.L.R. 383]; see also Allen, *The Wolf Case*, 45 Ill. L. Rev. 1, 23.)

APPENDIX C

RECENT RULINGS TURNING ON THE CONCEPT OF REASONABLE EXPECTATION OF PRIVACY

The California Supreme Court has logically applied the reasonable expectation of privacy test to several factual situations. *People v. Bradley*, 1 Cal. 3d 80 (1969) (no reasonable expectation of privacy in marijuana plants growing in the open near the sidewalk although located in a private home's backyard). *Dillon v. Superior Court*, 7 Cal. 3d 305 (1972) (no right of privacy in growing marijuana plants in backyard in plain view from the second floor bedroom of neighboring house, reported by neighbor). *People v. Sirhan*, 7 C.3d 369 (1972) reflects the California High Court's realistic approach to trash lying in the *open*, uncanned, in the backyard, exposed to whoever had the right to be there to see it. (No right to privacy where policeman saw letter lying in open view in trash while stationed to protect home and insure privacy of mother of alleged assassin of Senator Robert F. Kennedy.)

Likewise, our Courts of Appeal have found no privacy where matters have been exposed to open view. *People v. King*, 5 Cal. App. 3d 724 (no right to privacy in stolen property in plain sight in backyard observed by police walking up driveway in the course of investigating another felony). Even if an officer may have committed a trespass, his observations of matters *in plain view* are under some circumstances admissible. *People v. Doyle A. Terry*, 70 Cal. 2d 410, 427, 428 (1971). (No reasonable expectation of privacy in marijuana cigarette lying in plain sight in a closed but locked automobile, where said

car was viewed in a subterranean parking garage open to all tenants in a multi-unit apartment house.)

It is, however, clear from all of the above, that under California analysis the matter of plain sight as opposed to necessity to enter the opaque container, if any, is one of the distinguishing factors as to reasonableness. Some other jurisdiction may not agree, but, nonetheless, the California Courts are free, under the Fourth Amendment, to protect to the extent they desire the citizens of this state.

It is, therefore, quite readily apparent that California search and seizure law precludes search into closed opaque containers without a search warrant. The closed family garbage can, an adjunct to the domestic scenario, is so protected. *Edwards*, 71 Cal. 2d 1096; *Krivda*, 5 Cal. 3d 357.

Lest this Honorable Court feel that the California garbage can is automatically a word of magic to always insure privacy, respondents cite *People v. Superior Court*, (*Barrett*) 23 C.A. 3d 1004 (1972) (clearly distinguishing *Edwards, supra, Krivda, supra*) in which it was held there was no expectation of privacy where occupant of home, believing police were in hot pursuit, and while fleeing, placed narcotics contraband in neighbor's garbage can; there was no "search" of the trash can, merely a retrieval of a bag seen placed therein with probable cause to believe that bag contained contraband.

Obviously, *Barrett*, *supra*, is clearly analogous to the espoused doctrine of *Hester v. United States*, 265 U.S. 57 in the "hot pursuit" aspects; the discard of contraband in the view of police hardly bespeaks of an expectation of privacy, and discarding the contraband into a *neighbor's* garbage can under patently suspicious circumstances did not protect it.

In a well reasoned opinion, the United States Court of Appeals for the Ninth Circuit found a reasonable expectation of privacy in Christmas Trees cut and stolen from their place of growing when these trees were placed behind a motel although remaining in plain sight. *Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968). While *Wattenburg*, *supra*, deemphasized the "curtilage" and "open fields" concepts of *Hester v. United States*, 265 U.S. 57, the Court cited with approval *United States v. Potts*, 297 F.2d 68, 69 (6th Cir.):

> "Generally speaking, curtilage has been held to include all buildings in close proximity to a dwelling, which are continually used for carrying on domestic employment; or such place as is necessary and convenient to a dwelling and is habitually used for family purposes. . . ."

The latter Federal authority surely suggests that the domestic garbage can, necessary and convenient and used for family purposes, is within the curtilage and is entitled to protection.

Similarly, the *Wattenburg* Court approvingly cited *Care v. United States*, 231 F.2d 22, 25 (10th Cir.):

> "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family. . . ."

The fact that the garbage can in the case *sub judice* was at curbside was, of course, occasioned solely by the necessity for pick-up; it otherwise is surely "an adjunct to the domestic economy of the family. . . ."

Wattenburg, *supra*, gives the critical federal standard

> "... a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden, is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public ..." (388 F.2d 853, 857)

This Court has aptly delineated the purposes of the Fourth Amendment in *Camara v. Municipal Court*, 387 U.S. 523, 528:

> "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. ..."

Having established that Respondents entertained a reasonable expectation of privacy in their domestic trash container, it is difficult to imagine a more arbitrary invasion thereof than the planned utilization of the garbage haulers as police agents in effecting a search of Respondents' can.

Respondents suggest that the foregoing exemplary authority ordains that their domestic garbage can, a necessary adjunct to the domestic homelife scenario, be granted full Fourth and Fourteenth Amendment protection.